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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TRUTH, an unincorporated association, et al.,

Petitioners,

v.

KENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Truth, a Christian student group, applied for charter club status at Kentridge High School in Respondent Kent School District to secure access to facilities, funding, and other benefits. Other non-curricular student groups enjoy this status at the school. Truth's application was denied, however, because its membership criteria require students to possess a true desire to study the Bible and grow in a relationship with Jesus Christ. While the school district generally allows chartered student clubs to maintain group identity and expression by limiting membership to those who adhere to the group's ideology, the district's nondiscrimination policy denies religious groups this same privilege. This petition presents the following questions:

1. Did the Ninth Circuit err in holding, in conflict with decisions of this Court and the Second Circuit, that schools could circumvent the basic protections of the Equal Access Act by excluding religious groups under a nondiscrimination policy?

2. Did the Ninth Circuit err in holding, in conflict with decisions of this Court and the Seventh and Eighth Circuits, that an infringement on expressive association triggers a deferential reasonableness standard, rather than strict scrutiny?

LIST OF PARTIES

Petitioners are Plaintiffs Truth, an unincorporated association, Sarice Undis, and Julianne Stewart. Respondents are Defendants Kent School District, Barbara Grohe, Superintendent of Kent School District, Mike Albrecht, Principal of Kentridge High School, and Eric Anderson, Vice Principal of Kentridge High School, in their official capacities.

CORPORATE DISCLOSURE STATEMENT

Petitioners state that they have no parent companies or non-wholly owned subsidiaries.

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DECISIONS BELOW

The district court's ruling granting summary judgment in respondents' favor is unreported and reprinted in Appendix (App.) 111a-147a. The initial Ninth Circuit panel opinion is reported at 499 F.3d 999 and reprinted in App 74a-110a. The substituted Ninth Circuit panel opinion is reported at 524 F.3d 957 and reprinted in App. 39a-73a. The amended Ninth Circuit panel opinion is reported at 542 F.3d 634 and reprinted in App 1a-38a. The order denying Truth's petition for rehearing en banc, and the accompanying opinions concurring and dissenting from the order, appear at 551 F.3d 850 and are reprinted in App. 148a-164a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its panel decision on August 24, 2007. The panel withdrew its judgment, entered its substituted judgment, and denied Truth's petition for rehearing and rehearing en banc as moot on April 25, 2008. The panel amended its judgment to add a two-judge concurrence on September 9, 2008. Truth's second petition for rehearing en banc was denied on December 22, 2008. Petitioners obtained an extension of time, up and until March 10, 2009, to file petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The text of the Equal Access Act, codified at 20 U.S.C. §§ 4071-4074, is set forth in App. 165a-170a.

STATEMENT OF THE CASE

A. Factual Background

In the fall of 2001, Sarice Undis and Julianne Stewart attended Kentridge High School in the Kent School District in the State of Washington. They resolved to start a Christian club named Truth and applied to the Associated Student Body (ASB) for charter club status. App. 3a-4a. Kent School District Policy 2153 allows non-ASB-chartered student groups to meet informally on campus before and after school, provided they secure principal's approval, but "[u]nchartered clubs are not permitted to exist" at the school. App. 3a, 9a-10a. Conversely, chartered groups receive a variety of benefits, including access to campus facilities for meetings during instructional time, access to school bulletin boards, and eligibility for funding from the ASB. App. 9a-10a. In addition to a number of curriculum-

related groups, the school grants charter club status to a broad range of non-curriculum clubs, including Gay-Straight Alliance, Girl's Honor, Men's Honor, Key Club, Multicultural Student Union, Future Business Leaders of America, National Honor Society, Snowriders, and Earth Corps. App. 11a-12a.

The ASB Council entertained Truth's charter application during a September 2001 meeting, and several students objected. In lieu of a vote, the Council abstained until they could consult with Assistant Principal Eric Anderson. Anderson brought the issue to Principal Mike Albrecht, and they, in turn, informed Undis that the school would need to confer with the District's attorney about the matter and inform her of the decision. App. 4a.

School officials did not act on Truth's charter application during the entirety of the 2001/2002 school year. Undis repeatedly asked Anderson – at least ten separate times – about the status of the charter, but on each occasion, Undis was told that no decision had been made. App. 4a.

The school also declined to take up Truth's charter application during the summer and fall of 2002. App. 4a. Following the Ninth Circuit's ruling in *Prince v. Jacoby* – a case where the Ninth Circuit upheld a Christian club's right to obtain ASB recognition – Truth's attorney, Robert Tyler, faxed a letter to Principal Albrecht, insisting that the school approve Truth's charter. The school did not approve the charter, but requested that Truth submit a new application. App. 5a.

Stewart promptly submitted another charter application for Truth. The second charter included voting membership, and required such members to "profess[] belief in the Bible and in Jesus Christ." It also required officers to "believe in and be committed to biblical principles." App. 5a.

Three more weeks passed with the school still not taking any action on Truth's charter. Tyler then sent another letter to the school, again demanding that the school approve Truth's charter. App. 6a.

Approximately one month later, the ASB Council discussed Truth's second charter. Some students balked at Truth's name, claiming that it "implies that every other religion at Kentridge is a lie." Others said that they believed approving the charter would violate principles of "[c]hurch and state" and that the voting membership should be open to all. The Council declined to take a vote on the charter. App. 6a.

The ASB Council met again on April 1, 2003 to consider the matter. Anderson was present and explained that the school would make the final decision on Truth's charter even if the ASB Council approved the application. If the Council denied the charter, Truth would have no right to exist on campus. Following these comments, the ASB Council voted to deny Truth's charter application. App. 6a.

Two days later, Truth, along with Undis and Stewart, filed this action, alleging violations of the Equal Access Act and the First and Fourteenth Amendments. App. 6a. The next week, on April 9,

Anderson delivered a letter to Stewart, inviting Truth to submit yet another charter to the ASB Council. App. 9a.

Stewart complied with the request. The third charter provided a more expansive description of Truth, expounding on the club's purpose: to "study the Bible and the Gospel of Christ and to associate with other believers in Christian fellowship wherein our faith may be expressed to those in the club as well as those outside of the club." The application set out that meetings are open to everyone, but a member must have "a true desire to study the Bible and grow in a relationship with Jesus Christ," and be willing to "comply[] in good faith and Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." App. 7a. Voting members and officers are required to sign a statement of faith, stating that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," that "salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as [his or her] personal Savior, through His death on the cross for . . . sins, is . . . faith made real." App. 7a-8a.[1]

Truth crafted membership criteria to reflect their core beliefs. App. 174a. Through the criteria, Truth seeks to protect the group's purpose, identity, and expression, like many of the existing ASB-chartered student clubs at Kentridge, including:

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[1] Truth's third charter application, and accompanying constitution, is found at App. 173a-180a.

- Key Club, which requires members to be "interested in service, qualified scholastically, of good character, possessing leadership potential;"

- Earth Corps, whose members must have an "interest and dedication toward environmental issues;" and

- Gay-Straight Alliance, whose members "must be willing to work toward the goals of the club," which include "working to decrease homophobia" and fighting "heterosexism." App. 11a-12a.[2]

At its April 25 meeting, the ASB Council deliberated on Truth's third charter. The Council rehashed concerns about Truth's name, membership restrictions, and presence of a religious club at the school. In the end, the Council voted to deny the charter, listing four reasons for the decision: "Name," "Pledge to vote," "Segregating," and "Religious club in school." App. 8a.

In defending the Council's action, the District relies on its nondiscrimination policy. App. 9a. Kent District Policy 3210 states that the "district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color,

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[2] Earth Corps' charter application is found at App. 181a-183a and Gay-Straight Alliance's charter application and constitution is found at App. 184a-191a.

national origin, sex, . . . or physical, sensory or mental disabilities." App. 9a, 171a.[3] The District interprets "creed" to preclude religious student groups from establishing the same type of membership criteria that non-religious groups are allowed to adopt. App. 9a.

B. Proceedings Below

1. Cross-Motions for Summary Judgment and District Court Opinion

On cross-motions for summary judgment, the district court ruled in favor of the respondents. The court granted summary judgment on Truth's constitutional claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), concluding that the District took no action on Truth's charter. App. 121a-130a. Turning to the Equal Access Act, the court determined that Truth had not shown their "general membership policy is protected speech," triggering the Act's protection. App. 130a-135a. Then, going back to Truth's expressive association claim, the court offered an alternative holding. Pointing to this Court's expressive association cases, the court required the District to demonstrate that their interference with membership criteria furthered a "compelling state interest unrelated to

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[3] The District claims that this policy is derived from Washington's public accommodations nondiscrimination law, Wash. Rev. Code § 49.60.215 (West 2006) (prohibiting discrimination based on "race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person."). App. 10a-11a.

the suppression of ideas . . . [which] cannot be served through less restrictive means." App. 135a-147a. And, the court held that the District satisfied this stringent standard because its "compelling interest in preventing discrimination based on religion justifies intruding upon the Club's right to expressive association." App. 142a. The district court declined to evaluate Truth's remaining constitutional claims on the belief that they were all "subsumed" in Truth's expressive association argument. App. 147a.

2. Appeal and Ninth Circuit's Initial Opinion

The Ninth Circuit panel initially affirmed the decision of the district court, but on different grounds. At the outset, the panel dismissed the District's arguments on standing and ripeness, characterizing ASB's rejection of Truth's charter as a concrete injury-in-fact. App. 86a-91a. The panel elaborated that the injury is directly traceable to the District's nondiscrimination policy because the District had repeatedly rejected Truth's charter under its policy. App. 90a-91a. The panel also reversed the district court's *Monell* ruling, citing its previous decisions holding *Monell* inapplicable to claims for prospective relief. App. 91a-92a.

As for the merits, the panel first contemplated Truth's claim under the Equal Access Act. The panel noted the State's right to enact legislation prohibiting invidious discrimination. App. 92a-93a. And, for the balance of its analysis, the court focused on the phrase "content of the speech" found in the

Act. Construing this phrase to only prohibit restrictions that are facially content-based – and not indirect burdens on group speech – the panel upheld the District's nondiscrimination requirement as an appropriate "content-neutral" measure. App. 93a-100a. The Ninth Circuit did not recognize expressive association as a right protected by the Act or explain why Congress would enact a protection that is so easily evaded. In so holding, the Ninth Circuit conceded that it was "in some tension" with the Second Circuit's holding in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996). App. 98a-99a.

The panel then affirmed the district court's ruling on Truth's expressive association argument, finding no burden on a "First Amendment interest." App. 100a-107a. The panel cited this Court's forced-inclusion cases and pegged strict scrutiny as the appropriate standard to apply, but upheld the restriction on Truth in the absence of a "First Amendment interest." App. 103a-106a. The Ninth Circuit panel also distinguished an analogous case decided in the Seventh Circuit after the appeal was filed, *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), on this same basis that it could find no "cognizable First Amendment interest." App. 107a.

3. First Petition for Rehearing and Rehearing En Banc and Ninth Circuit's Substituted Opinion

Truth timely filed a petition for rehearing and rehearing en banc. Challenging the ruling on the

Equal Access Act, Truth stressed the need for en banc consideration in light of the admitted "tension" between the panel decision and the Second Circuit in *Hsu*. Concerning the expressive association aspect of the decision, Truth cited pertinent decisions of this Court, including *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Healy v. James*, 408 U.S. 169 (1972), and pointed out the error in not finding a First Amendment interest at stake with intrusion on a group's membership. Truth also drew attention to the conflict with the Seventh Circuit's decision in *Walker*. Lastly, Truth demonstrated the panel's error in ignoring undisputed evidence about other groups obtaining exemptions from the nondiscrimination policy.

The Ninth Circuit panel then withdrew its initial opinion, issued a substituted opinion, and denied Truth's petition as moot. App. 39a-40a. The panel's analysis on the Equal Access Act remained virtually the same. App. 58a-67a. But, in the substituted opinion, the panel surmised that their holding regarding the Act "is [actually] not inconsistent" with *Hsu* after all. App. 65a. Regarding the expressive association claim, the Ninth Circuit altered its analysis dramatically. The panel jettisoned this Court's expressive association jurisprudence and the strict scrutiny standard attached to it. Instead, the court applied public forum analysis. Relying almost exclusively on *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and its free speech analysis, the Ninth Circuit characterized the school as a limited public forum and upheld the District's

nondiscrimination policy as a reasonable and viewpoint-neutral restriction. App. 67a-71a.

The panel further deduced that Truth raised a triable issue of fact about whether the District violated Truth's rights in granting certain clubs exemptions to the nondiscrimination policy, while refusing to do the same for Truth. It remanded the case for further proceedings on this limited factual issue. App 67a, 71a.[4]

4. Second Petition for Rehearing En Banc and Ninth Circuit Panel's Amended Opinion

Truth filed a second petition for rehearing en banc. In this second petition, Truth reiterated the conflict between the Ninth Circuit and the *Hsu* Court on the scope of the Equal Access Act, and emphasized the inappropriateness of using forum analysis for judging the expressive association claim.

Reacting to this petition, the panel amended its opinion -- adding a concurring opinion from Judges Fisher and Wardlaw. App. 35a-38a. The two-judge concurrence, which amounted to a majority opinion, attempted to "amplify" and defend the panel's abandonment of its initial expressive association analysis and delayed adoption of public forum analysis. App. 35a-36a. The majority concurrence stated that "[e]xpressive association is

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[4] In conjunction with the remand, the Ninth Circuit gratuitously offered its doubts about the continued viability of this claim. App. 67a.

simply another way of speaking," and when the state restricts access to a limited public forum in a way that interferes with a group's expressive association, "we apply the lesser standard of scrutiny." App. 37a. While recognizing governmental intrusion on membership as infringing on expressive association, the majority concurrence carved out a special exception for violations in a limited public forum. App. 36a-37a. The majority concurrence further tried to distinguish *Walker*, saying: "Although the Seventh Circuit applied strict scrutiny in addressing [the expressive association] claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum." App. 38a.

5. Ninth Circuit Denial of Rehearing En Banc with Dissenting and Concurring Opinions

With Judges Bea and O'Scannlain dissenting, the Ninth Circuit denied en banc review. App. 148a-164a. Writing for the dissent, Judge Bea explained that the "essential problem with the majority is that it applies a *Rosenberger* 'free speech' analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* 'freedom of association' case (which deals with the formulation of the content of such speech)." App. 152a. He and Judge O'Scannlain observed that the panel's holding "flies directly in the face of Supreme Court precedent" by "telling [Truth] how its expression must be determined." App. 153a.

Elaborating on the prospect of an inter-circuit conflict, Judges Bea and O'Scannlain called attention to this Court's "clear mandate" to apply strict scrutiny to state intrusion on expressive association and the Seventh Circuit's adherence to this principle in *Walker*. App. 158a-162a. They also portrayed the panel's treatment of *Walker* as a "flat-out misrepresentation" because mention of forum in the *Walker* case referred to the free speech claim alone, not to the separate expressive association claim. App. 162a. Because *Walker* is "on all fours with our case," the dissent understood that the panel decision "clearly establishes a circuit conflict." App. 162a.

In a concurring opinion to the denial of rehearing en banc, Judges Fisher and Wardlaw reiterated their denial of a circuit split with *Walker*. App. 163a-164a.[5]

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for two distinct reasons.

First, this case presents an opportunity to resolve a critical issue that has divided the circuits about the scope and purposes of the Equal Access Act, specifically, whether the Act protects religious student groups' freedom to associate for expressive

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[5] Because the heart of the case – the Equal Access Act and expressive association claim – is subject to this Petition, the district court is staying the matter pending final decision of this Court.

reasons to the same degree as other non-curricular groups. The Act is intended to ensure that students engaging in religious expression have the same rights as other students to associate together and to speak. *Hsu*, 85 F.3d at 859. In refusing to recognize expression association as a freedom protected under the Act, the Ninth Circuit deviated from decisions of this Court and fundamentally undermined the basic purpose of the Act. If schools are free to discriminate against student religious groups because of their membership criteria, then the Act's protection against discrimination based on the religious nature of the speech would be a hollow guarantee. As a result, the decision clashes with the *Hsu* decision in the Second Circuit, and clarity is needed.

Second, this Court can resolve the conflict among the circuits on how to judge the propriety of infringement on a student religious group's expressive association. The Ninth Circuit's decision departs from the previously well-established principle of applying strict scrutiny to government regulations that coerce groups to accept members who would substantially alter their desired identity and message. *Dale*, 530 U.S. at 659; *Healy*, 408 U.S. at 181. The Ninth Circuit abandoned this Court's expressive association jurisprudence, and applied public forum doctrine instead, betraying the traditional meaning of associational freedom. The expressive association right is supposed to be "an indispensable means" of preserving many constitutional liberties, including the freedoms of speech, assembly, and petition. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). But, the Ninth Circuit's decision relegates the fundamental

guarantee to a superfluous notion that carries no independent significance, conflicting with decisions from the Seventh and Eighth Circuits.

I. THE NINTH CIRCUIT'S DECISION UNDERMINES THE PURPOSES OF THE EQUAL ACCESS ACT IN CONFLICT WITH DECISIONS OF THIS COURT AND THE SECOND CIRCUIT.

This Court, in *Widmar v. Vincent*, struck down a state university regulation that prohibited a student group from using school facilities for "religious worship or religious teaching." 454 U.S. 263, 265 (1981). After this decision, in 1984, Congress passed the Equal Access Act for the express purpose of providing the same protection to religious student groups in public secondary schools. *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 239 (1990). The Act makes it "unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a).[6]

The Ninth Circuit found no violation of the Equal Access Act on the theory that discrimination

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[6] The District falls under the constraints of the Act because it is a public secondary school, receives federal funding, and creates a limited open forum for non-curricular clubs. App. 26a.

against a religious club - because of the religious nature of the club's membership criteria - did not run afoul of the Act. In ruling against Truth on this issue, the Ninth Circuit does not appreciate expressive association as a component of the freedom protected by the Act. Nor does the court recognize membership criteria as being integrally related to content of speech, even though membership facilitates and furthers speech during group meetings. Rather, the Ninth Circuit construed the Act to proscribe only regulations that facially restrict content of speech.[7] This interpretation circumvents the basic protections of the Equal Access Act and allows state nondiscrimination policies to effectively preempt the Act.[8]

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[7] Finding expressive association uncovered by the Act, the Ninth Circuit marginalizes the import of it. Because thought precedes speech, government restrictions on what members of an association may or may not believe not only curtails the content in a given meeting, but also on a group's identity.

[8] The Ninth Circuit defends the existence of nondiscrimination policies on the footing that "States have the constitutional authority to enact legislation prohibiting invidious discrimination." App. 21a. But while this much is correct, nondiscrimination policies cannot be used in a way that frustrates the objective of the Equal Access Act. *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993). Moreover, there is nothing "invidious" about a religious group defining itself through shared beliefs because "religious discrimination by a religious group is 'vital' to the group's religious mission ...." *Hsu*, 85 F.3d at 869. The Constitution protects the rights of religious groups to select members who agree with their beliefs. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-40 (1987) (upholding exemption for religious organizations from Title VII ban on religious discrimination). For this reason, virtually all nondiscrimination laws, including Title VII (42 U.S.C. § 2000e-1(a)) and Washington's

The Ninth Circuit presents a remarkably narrow reading of the Act. *See* Jonathan Duncan, *The Equal Access Act: From Clear to Complicated in One Case*, 231 ED. LAW REP. 7, 11 (2008) ("The decision in *Truth* was surprising because it interpreted the Act's protections more narrowly than previous decisions by federal courts."). Dating back to its inspiration in *Widmar*, the Equal Access Act has always contemplated expressive association as an integral part of the assurances afforded. In *Widmar*, this Court expressly held that the challenged university policy infringed on the group's right to associate, as well as right to speech. 454 U.S. at 268-69.

Indeed, the whole focus of the Act is to protect a religious group's right to associate free from discrimination, as reflected in the text itself. The Act guarantees "equal access" of student groups, their freedom from "discrimination," as well as "a fair opportunity" to meet on the same basis as other groups. App. 165a. To be sure, the Act speaks to the "content of the speech at ... meetings," but that phrase cannot be read in isolation to deny any effective protection to religious groups who wish to control the content of speech at meetings by adopting certain membership criteria.

"[I]n expounding a statute, [courts] must not be guided by a single sentence or member of a

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employment non-discrimination law (Wash. Rev. Code § 49.60.040(3)), allow religious organizations to discriminate on the basis of religion.

sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (citation omitted). This axiom is particularly pertinent to the Equal Access Act, which is intended to be interpreted "broadly" to protect the rights of student religious groups. *Mergens*, 496 U.S. at 239. In lieu of interpreting the Act broadly, the Ninth Circuit exalted a restrictive reading of the phrase "content of the speech" over everything else in and about the Act.[9]

Legislative history confirms that the Act protects expressive association. The Senate Report declares up front that the Act's purpose is to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students." S. Rep. No. 98-357, at 3 (1984). The Act's "Legal Authority" section denotes that "the right of individuals to associate to further their personal beliefs" is among students' First Amendment rights, and that the "primary impediment to free association" is the "denial of use of campus facilities for meetings and other appropriate purposes." *Id.* at 23-24.

Dispensing with the aim of the Equal Access Act, the Ninth Circuit diverges from the Second

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[9] The Ninth Circuit strained to parcel out expressive association from the term "speech." Ironically, in conflating free speech and expressive association on the First Amendment issue, the majority concurrence even acknowledged: "Expressive association is simply another way of speaking...." App. 37a.

Circuit's interpretation of the legislation. The Second Circuit, in *Hsu*, concludes in contrast that the Act offers protection for free association. 85 F.3d at 859. The *Hsu* Court reasoned: "The Act's authors made it clear that the language of [the Equal Access Act] was intended to protect both free speech and free association rights of certain student clubs." *Id.* (citation of legislative history omitted).

In the face of this contrary analysis, the Ninth Circuit proclaimed that its decision "is not inconsistent" with *Hsu* because the Second Circuit "focused on the term 'speech' in the Act rather than the content-neutrality (or lack thereof) of school policies." App. 27a. But, this is to explain the conflict, not to erase it.[10] While the Second Circuit looked at the term "speech" in the Act and read it to include freedom of association, the Ninth Circuit interpreted the term only to concern verbal expression. *See* Charles Morris, *Association Speaks*

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[10] Also, the Ninth Circuit tried in vain to distinguish *Hsu* on the basis that the Second Circuit dealt with leaders, not general membership. App. 27a-28a. This factual difference is meaningless because the nondiscrimination policy in *Hsu*, and its application to leaders, survives under the rationale of the Ninth Circuit. Not only does the Ninth Circuit fail to include expressive association in its understanding of "speech," it does not even think that the Act can apply to nondiscrimination policies. *See* Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 906-07 (2009) (In commenting on the conflict between *Hsu* and *Truth*, Dean Howarth points out that "the Second Circuit in *Hsu* was divided in how far to extend the exclusionary rights of the Christian student club Walking on Water, but the Ninth Circuit panel rejected any basis for the Christian student club Truth to exclude non-Christians.")

Louder Than Words: Reaffirming Students' Right to Expressive Association, 19 GEO. MASON U. CIV. RTS. L.J. 193, 212 (2008) ("...the Ninth Circuit reasoned that the Equal Access Act protected only the content of verbal speech in school meetings. By so holding, the court deliberately eviscerated Truth's associational rights.")[11]

If the authors of the Act intended to do anything at all, they "sought to end discrimination against religious extracurricular groups in public schools by mandating a policy of neutrality." *Hsu*, 85 F.3d at 854. Truth is deprived of this key freedom because it is not permitted to limit its membership to those who subscribe to the group's principles. No other group in the District is inhibited in this manner. Earth Corps, for example, can associate according to ideology, restricting membership only to those students who adhere to the group's viewpoints about the environment. App. 11a, 181a-183a. Gay-Straight Alliance likewise can and does limit membership to students who share in the group's beliefs about and commitment to homosexual issues. App. 11a-12a, 184-191a. Truth is not treated the same as these and other groups simply because Truth's organizing principles are religious in nature. App. 173a-180a.

The Ninth Circuit recognized that other clubs in the District premise their membership on ideology, but reasoned that "nothing in the District's

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[11] The Ninth Circuit was more candid about the conflict with *Hsu* in its initial opinion: "Our reasoning is in some tension with that of the Second Circuit ...." App. 98a-99a.

non-discrimination policy prohibits discrimination on the basis of *political* belief." App. 66a. (emphasis added). This merely restates the existence of discrimination. In other words, non-religious groups are free to limit membership to adherents in ways that further the mission and resulting speech of the group, while religious groups are denied this right. But even if the policy was uniform in application, "exemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'" *Hsu*, 85 F.3d at 860. *See also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 57 (2006) (explaining that the Solomon Amendment "looks to the *result* achieved" by a school's recruiting policy; applying the policy uniformly is "insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military.").

The disparate treatment from which Truth suffers is precisely what the Act is intended to alleviate: "To the Act's authors, 'equal access' meant that 'secondary school students engaging in religious speech have *the same rights* to associate together and to speak as do students who wish to meet to discuss chess, politics, or philosophy.'" *Hsu*, 85 F.3d 854 (citation omitted).

In sum, the Ninth Circuit's holding betrays Equal Access Act's explicit purpose of ensuring "equal access" for religious groups. Reading the Act narrowly, so as to strip it of protection for students' free association, the Ninth Circuit has disregarded

the legislative purpose and the text of the Act, as well as this Court's guidance on the Act, and has effectively created a "[c]onflict between federal appellate courts [that] presents an opportunity for Supreme Court intervention." Duncan, *supra*, at 11.

II. THE NINTH CIRCUIT'S DECISION RUNS AFOUL OF THIS COURT'S EXPRESSIVE ASSOCIATION CASES AND CREATES A CONFLICT AMONG THE CIRCUITS.

In the initial paragraph of the decision below, the Ninth Circuit observed that Truth's legal claims include, among other things, "violations of ... the First Amendment rights of free speech and expressive association." App. 3a. Despite the recognition of two distinct claims, the Ninth Circuit went on to mix up the two in its analysis, using forum analysis to judge the entirety of the matter.[12] This approach is deeply flawed. The holding runs counter to this Court's precedent and the Seventh and Eighth Circuits' interpretation of the precedent.

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[12] The panel's analysis is puzzling, particularly, in light of its prior decision, *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007) (withdrawn). At that juncture, the panel recognized Truth's right to expressive association as a distinct First Amendment claim and analyzed the claim under this Court's expressive association cases. App. 100a-107a. The panel made various and critical mistakes in that portion of the opinion, and Truth enumerated these errors in the first petition for rehearing en banc. But instead of correcting the errors, the Panel abandoned the expressive association analysis altogether. *Cf.* App. 30a-38a.

A. The Ninth Circuit Wrongly Applied Forum Analysis to Truth's Expressive Association Claim.

The freedom to associate – and the corresponding right *not* to associate – is implicit in the First Amendment freedoms of speech, assembly, and petition. *Roberts*, 468 U.S. at 622. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* And, importantly, the associational right encompasses the autonomy to define and control group membership. *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981).

This Court, in *Dale*, confirmed the proper analysis for evaluating governmental intrusion on a group's membership. The right of expressive association is implicated if a group "engage[s] in some form of expression, whether it be public or private," and the forced inclusion "would significantly affect the [group's] ability to advocate public or private viewpoints." 530 U.S. at 648, 650. Such intrusions are only permissible if the government can prove they are "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623).

This Court noted that the Boy Scouts' mission is to instill values in young people, both expressly and by example. *Id.* at 649-50. Two principle values were living "morally straight" and "clean," and the Scouts viewed homosexual behavior to be inconsistent with those values. *Id.* at 650. Emphasizing that "deference [must be given] to an association's view of what would impair its expression," this Court held that Dale's forced presence in the Scouts would require it "to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. And, because the state was unable to muster a compelling reason for interference with the Scouts' expressive association, the restriction was struck down as unconstitutional. *Id.* at 659.

The same concerns are present here. Truth's general membership criteria are intimately tied to the fundamental purpose of the organization and its expression. Allowing those who lack desire to have a relationship with Jesus Christ, or who openly flaunt their disdain for the Bible's instruction on conduct, to become and hold out themselves as members, would significantly undercut the core message Truth is seeking to convey inside and outside of its group.

Thus, "*Dale* is not only illuminating, it is determinative of this case." App. 153a (Bea, J., dissenting). Strict scrutiny – the test used in *Dale* – should apply to the restriction on Truth. *Dale* is just the latest in a long line of this Court's opinions holding that regulations affecting a group's ability to associate or disassociate must survive strict

scrutiny. *See, e.g., Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (inquiring whether the State has a compelling interest that would justify its intrusion on a Rotary Club's membership criteria); *Roberts*, 468 U.S. at 623 (explaining that infringements on the right to expressive association must "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *Democratic Party*, 450 U.S. at 124-25 (holding that the state did not provide a compelling interest to justify intruding on the Democratic Party's right to expressive association).

Instead of following (or even citing) *Dale*, the Ninth Circuit upheld the nondiscrimination policy as "viewpoint neutral and reasonable in light of the purposes of the forum." App. 31a. So holding, the Ninth Circuit placed much emphasis on the fact that the District does not keep Truth from existing as a Policy 2153 group before or after school.[13] But the nature of the burden does not alter the analysis for expressive association. In addition to precluding direct interference with a group's membership, the guarantee also serves to keep the government from penalizing or burdening the right to expressive association. *Healy*, 408 U.S. at 183.

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[13] In blocking ASB status, the District denies Truth the opportunity to meet during school. The District further denies Truth funding, chance to advertise, recognition in yearbook, and access to public address system.

In *Healy*, a state university provided official recognition to student groups, which allowed them to meet on campus and make announcements through university channels like newspapers and bulletin boards. 408 U.S. at 176. The university refused to officially recognize a chapter of the Students for a Democratic Society, citing a conflict between the group's philosophy and university policy. *Id.* at 174-76.

This Court upheld the students' expressive association challenge, underscoring the protection afforded against even "indirect" interference with fundamental rights. *Id.* at 183. "There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right," regardless of the group's ability to exist outside of the campus community. *Id.* at 181. As a "form of prior restraint," the university bore a "heavy burden" to justify the appropriateness of its restriction—a burden it failed to meet. *Id.* at 184.[14]

Healy is controlling here. Both schools opened forums providing official recognition for student clubs and granting access to facilities, channels of communications on campus, and funding. Truth is excluded from the forum, like the club in *Healy*,

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[14] This Court empathized with the school's need to impose reasonable regulations for maintaining order and preventing material disruptions in the educational environment, but noted a difference between advocacy, which is fully protected, and action, which is not. *Id.* at 192. Here, the District has not even suggested that Truth could disrupt the educational environment.

because its association is contrary to school policy. Truth, too, could use alternate locations and modes for communication, but this does not "ameliorate significantly the disabilities imposed" by the school's action. *Id.* at 183.

As with *Dale*, the Ninth Circuit missed the instruction of *Healy*. The Ninth Circuit dismissed this Court's holding as irrelevant because, in its view, the District has only opened a limited public forum.[15] The Ninth Circuit mistakenly relied on forum analysis for assessing Truth's expressive association claim.

The Ninth Circuit's novel analysis robs expressive association of its independent force and any true meaning. This Court has consistently recognized that the freedom to associate is not only an important component of speech, but is the linchpin in preserving other cherished liberties as

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[15] In the two-judge majority concurrence of the amended opinion, Judges Fisher and Wardlaw wrote separately to "amplify" their thinking on this particular issue. They cited *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) for the right to expressive association in a traditional public forum and cited *Healy* for the same right in what they depicted as a "general public forum." App. 35a-38a. The court drew the line there, though, requiring different treatment for expressive association in a limited public forum. This differentiation finds no support in this Court's jurisprudence. While *Hurley* did concern a parade on a public street, this Court's ruling did not turn on forum status. *Hurley*, 515 U.S. at 573-81. And this Court made no mention of "general public forum" or even forum analysis in *Healy*. Regardless, from a pure factual standpoint, the forum in *Healy* is no more "general" than the forum in this case, as both involve denial of access via school policy.

well. The right has firm constitutional roots in multiple clauses, including the freedoms of assembly and petition, in addition to speech. *Healy*, 408 U.S. at 181. And, it is "an indispensable means" of preserving each of these liberties. *Roberts*, 468 U.S. at 618. The freedom of association serves a distinct, elemental constitutional purpose and must be evaluated under its own constitutional standards.

Forum analysis is often appropriate for free speech claims, though sometimes difficult to apply, but there is no justification for transplanting the doctrine to expressive association rights. With expressive association, forum is not even a relevant consideration. An imposition on a group's expressive association goes beyond any particular venue and attacks its identity.[16] The District's nondiscrimination requirement does not merely affect Truth's speech within the confines of the school; it follows Truth wherever it goes. Truth is thus forced into an untenable dilemma: either abandon its religious identity to be a full participant of campus life or accept second-class status at the price of religious identity. In either instance, Truth cannot function as the group it is designed to be.[17]

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[16] It would make no sense to exclude organized churches from limited public forums because their membership criteria discriminate on the basis of religion, and yet, this is the impact of the Ninth Circuit's decision.

[17] Dean Howarth, in her thorough treatment on the issue, speaks to the irony of nondiscrimination policies in this context.

> Equality and nondiscrimination are too precious to be reduced to the silly formalities of insisting that faith-based organizations cannot discriminate on the basis of faith. We

B. The Ninth Circuit conflicts with Seventh Circuit and Eighth Circuit on the Proper Framework for Analyzing Expressive Association Claims.

The Ninth Circuit's decision also "clearly establishes a circuit conflict." App. 162a (Bea J., dissenting).

First, the Seventh Circuit's decision in *Christian Legal Society v. Walker* is "on all fours with our case." App. 162a (Bea J., dissenting). *Walker* involved a public law school that offered official recognition to student groups. As here, recognition provided groups access to various channels of communication on campus, the ability to reserve meeting space, and funding from the school. *Walker*, 453 F.3d at 857. The school revoked the official status of the Christian Legal Society (CLS), however, because it required members to subscribe to a statement of faith – a violation of the school's nondiscrimination requirement for student clubs. *Id.* at 858. CLS could still meet on campus, but it did not have access to any of the other benefits afforded officially recognized groups. *Id.*

> do not really expect student organizations to ignore their defining purposes in selecting members and officers, and the pretense that we do is causing an unnecessary and harmful battle that pits equality for LGBT people against First Amendment rights of students.

Howarth, *supra*, at 923-24.

CLS challenged the revocation as violating its rights of expressive association and free speech. The Seventh Circuit analyzed these two claims separately. Relying on *Dale* and *Healy*, it applied strict scrutiny to the expressive association claim. *Id.* at 861-64. It then applied forum analysis to the free speech claim. *Id.* at 865-67.

The Seventh Circuit concluded that CLS engages in expressive activity, highlighting that CLS, much like Truth, is a "group of people bound together by their shared Christian faith and a commitment to showing the love of Christ to the campus community and the community at large by proclaiming the gospel in word and deed." *Id.* at 862 (quotation marks omitted). The court then asked whether forced inclusion of those who did not share its beliefs would affect CLS's message. "To ask this question is very nearly to answer it," it concluded. *Id.* Using as an example CLS's belief that sexual conduct outside of a traditional marriage is immoral, the Seventh Circuit found that it would be "difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863.

The university in *Walker* argued that the *Dale* standard was inapplicable because it was merely excluding CLS from a forum, not imposing a prohibition on CLS's membership criteria. But the Seventh Circuit disagreed, finding that this Court in *Healy* had already rejected the argument, and confirmed that the university "may not do indirectly

what it is constitutionally prohibited from doing directly." *Id.* at 864. (citing *Healy*, 408 U.S. at 183).

Although the Ninth Circuit here acknowledged that the *Walker* court applied strict scrutiny to an expressive association claim, it deemed *Walker* distinguishable because "[*Walker*] notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum." App. 38a. But the Ninth Circuit misreads (and, as a result, misrepresents) *Walker*. The Seventh Circuit invoked forum analysis for evaluating CLS's free speech claim after it already had concluded that CLS was likely to succeed on its expressive association claim. Walker, 453 F.3d at 865. The mention of a forum in a separate section of the opinion does not erase the conflict with *Walker*.[18]

The logic of the Ninth Circuit is also at odds with the Eighth Circuit's decision in *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000). There, the Eighth Circuit declined to apply forum analysis to an expressive association claim, even though the issue concerned access to a limited public forum. In *Cuffley*, a state refused to allow the Ku Klux Klan to participate in its Adopt-A-Highway program because the Klan's membership criteria discriminate on the basis of race, religion, color, and national origin. *Id.* at 705. The Eighth Circuit saw "little question that

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[18] As described by Judges Bea and O'Scannlain, this attempt to distinguish *Walker* "is not only a *non sequitur* because the two claims [free speech and expressive association] are distinct; it is a flat-out misrepresentation." App. 161a-162a.

requiring the Klan to accept non-'Aryans' would significantly interfere with the Klan's message," citing several of this Court's expressive association cases. *Id.* at 708. The court held that the state "cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." *Id.* at 709. The Eighth Circuit thus applied expressive association standards, not forum analysis, contrary to the Ninth Circuit's decision here.

This conflict among the circuits warrants resolution by this Court. There exists a disparity in the basic legal framework used to decide the fundamental constitutional freedom of expressive association.

CONCLUSION

For the foregoing reasons, this Court should grant Truth's petition for writ of certiorari.

Respectfully Submitted,

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APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRUTH, an unincorporated association; SARICE UNDIS, a minor, by and through her father, LARRY UNDIS; JULIANNE STEWART, a minor, by and through her parents, PAUL and ANNA STEWART,
Plaintiffs-Appellants,
v.
KENT SCHOOL DISTRICT; BARBARA GROHE, Superintendent of Kent School District; MIKE ALBRECHT, Principal of Kentridge High School; ERIC ANDERSON, Assistant Principal of Kentridge High School, in their official capacities,
Defendants-Appellees.

No. 04-35876

D.C. No. CV-03-00785-MJP

AMENDING OPINION ONLY TO INCLUDE CONCURRENCE

Appeal from the United States District Court for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted
July 27, 2006—Seattle, Washington

Filed April 25, 2008
Amended September 9, 2008

Before: J. Clifford Wallace, Kim McLane Wardlaw, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Wallace; Concurrence by Judge Fisher

COUNSEL

Nathan W. Kellum, Alliance Defense Fund, Memphis, Tennessee, for the plaintiffs-appellants.

Michael B. Tierney, Mercer Island, Washington, for the defendants-appellees.

Jane M. Whicher, Port Townsend, Washington, for amicus American Civil Liberties Union.

Sara J. Rose, Washington, D.C., for amicus Americans United for Separation of Church and State.

David F. McDowell, Los Angeles, California, for amicus Anti-Defamation League.

ORDER

The opinion filed on April 25, 2008 in the above-captioned case is amended only to include the concurrence filed this date.

Appellant's Petition for Rehearing En Banc is still pending.

OPINION

WALLACE, Circuit Judge:

Appellants Truth, Sarice Undis, and Julianne Stewart (collectively, Truth) appeal from a summary judgment in favor of the Kent School District and other appellees (collectively, District). Truth alleges violations of the Equal Access Act (the Act), the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand.

I.

This appeal arises from Truth's attempt to form a student club at Kentridge High School (Kentridge), which is part of the Kent School District. Under the relevant policies at Kentridge, "[u]nchartered clubs are not permitted to exist." To obtain a charter, students must submit a proposed charter to the Associated Student Body (ASB) Council and secure approval.

Beginning in the fall semester of 2001, appellants Undis, then a junior, and Stewart, then a sophomore, attempted to form a Bible club at Kentridge. Undis and Stewart submitted a "Club Charter Application" (first charter) for official

recognition as an ASB organization in September 2001. This first charter indicated that the club's name was to be "Truth" and that the purpose of the organization was to "have a Bible study to encourage and help become better people with good morals." Under the section "Membership Criteria," the first charter indicated that the group was to be "[o]pen to anyone." The charter also proposed that it would designate a "quote of the week for announcement" and "once a month decorate [the] school with a theme."

The ASB Council discussed Truth's first charter at a September 2001 meeting, and several students objected to chartering Truth. The ASB Council decided to consult with the Assistant Principal, appellee Eric Anderson. Anderson and appellee Mike Albrecht, Principal of Kentridge, later told Undis that they would speak with the school's attorney regarding the legality of granting Truth ASB recognition. Albrecht stated that "the problem with the September 2001 proposal was that it involved broadcasting a weekly Bible quote over the school's public address system and monthly decoration of the school in a biblical theme."

No action was taken on the first charter for the remainder of the 2001-02 school year. During that time, Undis asked Anderson to make a decision on Truth's application on at least ten occasions, to no avail. Sometime in the spring semester of 2002, all ASB clubs were instructed to resubmit their charters. The record does not reveal any further activity on Truth's application during the summer and fall semesters of 2002.

During this period, we decided *Prince v. Jacoby*, which involved a request by a Bible club for ASB recognition in a different Washington school district. 303 F.3d 1074 (9th Cir. 2002). On January 7, 2003, an attorney for Truth, Robert Tyler, wrote to Albrecht stating that it was "constitutionally imperative that [Kentridge] grant [appellants'] proposed Bible Club treatment and rights equal to all other noncurriculum clubs." The letter also insisted that Kentridge "immediately adhere to the requirements of the Equal Access Act and the First Amendment," and threatened litigation if Kentridge did not comply.

On January 30, 2003, Tyler sent a second letter to Michael Harrington, counsel for the Kent School District. Tyler requested the forms required to establish an ASB club, and threatened litigation if Truth's charter was not approved by February 4.

On February 2, as requested by Anderson, Undis and Stewart submitted a new application (second charter). The second charter removed the quote-of-the-week and monthly theme decoration provisions of the first charter. The club's stated purpose was now to "provid[e] a biblically-based club for those students interested in growing in their relationship with Jesus Christ." Although membership would be open to all students, the second charter restricted voting membership to "members professing belief in the Bible and in Jesus Christ." Officers would also be required to "believe in and be committed to biblical principles."

After a third letter to Harrington from Tyler, the second charter was discussed at an ASB Council meeting on March 27. Some students expressed disapproval of the club's name, suggesting that it "implies that every other religion at Kentridge is a lie." Some council members also expressed concerns that granting the charter would violate "[c]hurch and state" and that the voting membership should be open to everyone. Additionally, members suggested that students could go to "Young Life," a non-ASB recognized organization that met on Kentridge's campus after school hours. The minutes of the March 27 meeting reveal that the question of whether to approve the second charter was discussed for twenty minutes. No vote was taken.

The second charter was next addressed at an ASB Council meeting on April 1. After a brief clarification on the role of the advisor for the club, the minutes show that Anderson stated that if the ASB Council voted to approve the charter, he would consult the District's attorneys and Kentridge would make a final decision on approving the charter. The Counsel voted eleven to six against approval of Truth's second charter.

On April 3, Truth filed a complaint in the United States District Court for the Western District of Washington, alleging that defendants had violated the Act, as well as the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. Truth sought injunctive and declaratory relief as well as nominal damages.

On April 9, Anderson sent Stewart a letter informing her of her right to resubmit Truth's application for ASB club recognition: "As was discussed at the ASB meeting on March 28th, by making minor changes to Article[s] I and III of the proposed Constitution for your club, you will address the points raised." Article I sets forth the name of the club and Article III contains the voting membership and officer restrictions. Anderson advised Stewart to "be prepared to resubmit by the April 25th ASB Meeting." Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected."

Stewart and Undis submitted the third charter on April 24. The third charter maintains the proposed name "Truth." However, it divides the membership into three categories: voting members, non-voting members, and attendees. Meetings are open to everyone. But the "privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." The charter application also lists a "true desire to . . . grow in a relation-ship with Jesus Christ" under the "Membership Criteria" heading. In order to be a voting member or officer, students are required to sign a "statement of faith." The statement of faith requires the person to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God." A voting member must also pledge that he or she believes "that salvation is

an undeserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Other than the ability to call oneself a "member," there is no difference between the rights of non-voting members and attendees.

The third charter was discussed at the April 25 ASB Council meeting. The ASB Council again objected to the name, selectivity provisions, and the presence of religion in school. The council voted nineteen to zero to deny approval of the charter, with one member undecided. The minutes give four reasons why the charter was not accepted: 1) "Name," 2) "Pledge to vote," 3) "Segregating," 4) "Religious club in school."

On May 6, Tyler wrote to the Kent School District's counsel stating that it was his "understanding from the ASB Constitution that this rejection by the ASB is the final decision." The letter also provided that Tyler "was unable to locate any rights to appeal the decision of the ASB," but that if there were "a right to appeal the decision of the ASB," he asked that the letter "serve as a formal request for appeal."

Anderson advised Undis and Stewart in a May 12 letter "that pursuant to Kent School District Policy 2340, [they had] the ability to discuss this matter with Mr. Albrecht," and mentioned the possibility of discussions with the District superintendent or the ombudservices office. Although Tyler's May 6 letter would appear to have invoked these processes, no further action was taken by the District. Policy 2340

concerns "religious related activities or practices." The policy does not refer to ASB recognition, and the ASB Constitution does not refer to this policy as providing an avenue for an appeal of the District's decisions, which are otherwise "final."

Although Undis and Stewart have both graduated from Kentridge, they have indicated that another student, Lindsay Thomas, is prepared to assume leadership of the club if the charter is approved.

The Kent School District has three policies relevant to this appeal. First, Policy 3210 provides that "[t]he district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status, previous arrest . . . , incarceration, or physical, sensory or mental disabilities." The district court held that inclusion of "creed" indicates that discrimination based upon religion is prohibited. That ruling has not been challenged on appeal.

Second, Policy 2153 provides for "noncurriculum-related, non ASB student groups," which groups the principal shall approve provided they meet several additional requirements, such as that they do not disrupt the school environment. While Policy 2153 groups may meet on school grounds before or after school, these groups do not receive other benefits accorded only to ASB-sponsored student clubs. Most significantly, only ASB-chartered groups may receive ASB funding and engage in purchasing through the

Kent School District Finance Department. Each ASB club is provided with a faculty advisor or adult advisor designee, who must be present at all club meetings and assists in the planning and handling of the club's affairs. ASB clubs are also allowed to conduct meetings during noninstructional time, advertise their activities in school, use the public address system, and are recognized in the school yearbook. The District states that Truth "is free to operate as a private Policy 2153 group," but argues that Truth was properly denied ASB recognition.

Third, Policy 2340P regulates "religious related activities or practices," and provides guidelines for schools addressing religious holidays, symbols, ceremonies, topics, activities, and beliefs. This policy also provides that "[s]tudents, parents, and employees who are aggrieved by practices or activities conducted in the school or district may seek resolution of their concern first with the building principal, then with the district superintendent or designee, or use ombudservices, which is available through the Legal Services Department."

Washington State also has a relevant non-discrimination law, which the District relies on to justify its denial of ASB recognition for Truth. In 2003, Washington Revised Code § 49.60.215 (West 2006) provided that:

> It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, . . .

> or the refusing or withholding from any person the admission, patron-age, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person.

The District has argued that these non-discrimination policies require it to deny ASB recognition to Truth.

As of April 3, 2003, there were thirty ASB-recognized clubs at Kentridge. While the record does not contain the charters of all the clubs, it appears that many of them have selective membership criteria. Indeed, each charter application contains a section for "Membership Criteria."

The EarthCorps, for example, requires members to show "interest and dedication toward environmental issues." Similarly, the Key Club requires that members be "interested in service, qualified scholastically, of good character, possessing leadership potential . . . [and] willing to perform at least fifty hours of . . . service." The Gay-Straight Alliance requires that students "must be willing to work towards the goals of the club" to be members. These goals include "bring[ing] GLBTQ [Gay, Lesbian, Bisexual, Transgendered, and Questioning]

issues into the open, while working to decrease homophobia." Other goals include "changing stereotypes" and "fight[ing] heterosexism and other forms of oppression." The National Honor Society selects its members based on "outstanding scholarship, character, leadership, and service," and requires them to "behave in a courteous and respectful manner, refraining from language and actions that might bring discredit upon themselves." It also requires members to refrain from using or possessing alcohol or illegal substances. Participation in school sports requires maintaining a certain grade point average and attendance record, not using drugs or alcohol, and complying with the "sports code." Finally, a Men's Honor Club and a Girl's Honor Club also operate at Kentridge as ASB-recognized groups. Each club has gender-exclusive membership.

The district court entered summary judgment on all of Truth's claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), with the exception of the Act claim. The court held that the requirements of municipal liability under 42 U.S.C. § 1983 were not satisfied, and therefore entered summary judgment in favor of the District. It also held that the actions against the individual defendants in their official capacities were functionally equivalent to suits directly against the municipality, and therefore Truth's claims against them failed.

The district court ruled on the merits of the Act and some of the First Amendment claims, addressing the latter as an alternate holding if its

Monell ruling were to be reversed. It held that the restrictions on general membership in the third charter constituted a legitimate basis for denying the third charter and that these claims therefore failed.

The district court did not rule on the remaining claims based on its belief that "Plaintiffs' cursory Equal Protection Clause, Establishment Clause, and Free Exercise Clause arguments are all subsumed within their First Amendment argument." The district court also did not address the District's argument that granting ASB recognition to Truth would violate the Establishment Clause.

On appeal, both sides agree that only the third charter is before us. Truth makes this concession even though this action was filed before the third charter and its complaint only addresses the denial of its second charter.

This appeal requires us to review many determinations by the district court. As to each issue, we review de novo. We review a district court's summary judgment de novo. *See Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). In deter-mining whether summary judgment was appropriate, we view the evidence in the light most favorable to Truth, the nonmoving party. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). "We may affirm on any ground supported by the record." *Id.* We also review de novo the district court's *Monell* rulings, *see Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir. 2003), its "decision regarding the scope of a constitutional right," *see United States v. Napier*, 436 F.3d 1133, 1135-36 (9th Cir. 2006), and

its interpretation of the Act, *see SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003).

II.

Before addressing the merits, we consider our jurisdiction. The District argues that Truth lacks standing under *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983), because Truth has failed to meet the "likelihood of recurrence" requirement. The District asserts that Truth "cannot say the ASB or the District will always deny another Club application or even the same application."

[1] In order to establish Article III standing,

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). Although the District has not made any arguments regarding these specific factors, we have an independent obligation to address whether we have subject-matter jurisdiction. *See Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing

elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

[2] With respect to injunctive relief, the Supreme Court has also required that a plaintiff show that "he is realistically threatened by a repetition of [the violation]." *Lyons*, 461 U.S. at 109. "The plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such recurrence is probable." *Jones v. City of Los Angeles*, 444 F.3d 1118, 1127 (9th Cir. 2006), *citing Honig v. Doe*, 484 U.S. 305, 318 & n.6 (1988). While we have extended this requirement to declaratory relief, *see Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006), it does not apply to monetary damages, *see Lyons*, 461 U.S. at 105. The District's standing argument therefore does not implicate Truth's standing to seek nominal damages.

The District asserts that the Establishment Clause, state law, and its own non-discrimination policies mandate that it deny ASB recognition to Truth. If the District believes that three independent and binding legal authorities compel it to deny Truth's application, we do not see how the District might approve the same or a similar charter request in the future.

[3] The District's written non-discrimination policies also support Truth's standing arguments. We have held that plain-tiffs "may demonstrate that an injury is likely to recur by showing that the defendant had . . . a written policy, and that the injury 'stems from' that policy. Where the harm

alleged is directly traceable to a written policy there is an implicit likelihood of its repetition in the immediate future." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (internal quotations and alterations omitted). Here, the harm is traceable to the District's policies, which the District has argued compel it to deny ASB recognition to Truth.

Additionally, despite Tyler's request that the District treat his letter as a "formal request for appeal," the District took no action. This is evidence that another charter request is likely to meet the same fate as the previous three. Finally, the District has provided nothing beyond its own speculation that the outcome might be different if Truth submitted a fourth charter. The legal positions it has taken in this litigation strongly suggest that no similar applications will ever be approved.

[4] Under these circumstances, we conclude that Truth has established at least a genuine issue of material fact as to whether there is a reasonable expectation that the alleged injury will recur. Therefore, Truth has standing to seek each of its requested forms of relief.

The District also suggests that this dispute is not ripe for review, and that we thus lack jurisdiction, because Truth did not bring the dispute to the Kent School District Board or Superintendent through Policy 2340P. The District is wrong. The Supreme Court has explicitly held that exhaustion is not required for claims brought under 42 U.S.C. § 1983. *See Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974).

Exhaustion cannot be dispositive under a ripeness analysis; otherwise ripeness doctrine would impose a *de facto* exhaustion requirement, in violation of *Steffel*. Thus, the alleged failure to exhaust administrative remedies may be at most only a factor in the ripeness analysis.

[5] Nevertheless, it appears that Truth did exhaust the formal appeal system. Tyler's May 6 letter to the District's counsel asked that the letter "serve as a formal request for appeal." The District has not provided any reason why this notification was not sufficient to trigger its appeals process, and no reason is apparent in the record. The District's failure to take any action as a result of this request does not indicate that Truth failed to bring the matter to the attention of the District. Under these circumstances, there is at least a genuine issue of material fact as to whether Truth exhausted the District's grievance procedures.

Nearly every other factor suggests that this case is ripe for decision. Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected." The ASB Constitution neither pro-vides for any additional review, nor suggests that the ASB Council's decision lacked finality.

Furthermore, there is no doubt that the effects of the denial of Truth's charter have been felt in a concrete way by the appellants. Truth's members have experienced three denials of their applications,

as well as protracted delays in obtaining any action from the ASB Council and District. The harm that Truth has complained of does not "rest[ ] upon contingent future events" or ones that "may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation omitted). Instead, Truth complains of discrete events that have already occurred.

[6] Finally, "in evaluating ripeness, courts assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir. 2000) (internal quotation omitted). We conclude the hardship to Truth in denying adjudication outweighs the hardship to the District in deciding this appeal. Truth's application for ASB recognition languished for nearly sixteen months without any significant action being taken, and the ASB process appears to have stalled until Truth obtained counsel and threatened to sue. More than five years have passed since the submission of the first charter, and declining to decide this appeal now would present a significant hardship to appellants.

[7] By contrast, the hardship to the District is significantly less severe. The District has been aware of Truth's arguments for a long time and has had ample opportunity to take corrective action or change its policies, if it so desired. Its legal positions on appeal show that it does not believe any remedial action is appropriate and that it believes the denial of ASB recognition was proper. We therefore conclude that this case is ripe for decision.

III.

[8] We must also consider the district court's ruling that the requirements of *Monell* are not met. *Monell* permits section 1983 actions against municipalities, but requires plaintiffs to show that their injuries resulted from "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. *Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here. *See Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989). The District acknowledges the con-trolling effect of *Chaloux*, but argues that it should be overruled because it "rests on shaky grounds."

[9] It is well established in our circuit that while

> a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law, we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.

Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (internal citation and quotations omitted). The District argues that two Supreme Court cases, *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County*, 520 U.S. 781 (1997), show that the "Supreme Court has re-emphasized

the importance and vitality of the doctrine that requires a municipal policy as a precondition to a lawsuit under § 1983." Neither of these cases addresses whether *Monell* applies to actions only seeking prospective relief. We have no authority to overrule *Chaloux*. *Chaloux* applies, and the district court's *Monell* ruling is reversed.

IV.

Relying on its non-discrimination policies, the District points to three aspects of Truth's third charter that justify its decision to deny the club ASB recognition: 1) the general membership restrictions, 2) the leadership and voting membership restrictions, and 3) the name "Truth." The district court granted summary judgment based only on the first justification, and explicitly declined to reach the other two. Accordingly, we too limit our analysis to the general membership restrictions. So long as the District had at least one permissible basis for rejecting Truth's charter, the district court properly granted summary judgment, and we need not address the District's remaining justifications.

We begin our analysis by considering whether the District violated the Act. If we determine that it did not, we then move on to consider whether the District's actions ran afoul of the First Amendment. *See Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002) ("We consider each of Prince's access claims separately, first under the Act, and then the First Amendment, to the extent we find them outside the scope of the Act").

A.

[10] States have the constitutional authority to enact legislation prohibiting invidious discrimination. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624-26 (1984) (reviewing the history of state anti-discrimination laws and observing that a "State enjoys broad authority to create rights of public access on behalf of its citizens"). Truth asserts that it does not discriminate based on religion in violation of the plain language of the District's policies, but rather imposes a code of conduct not unlike those of other approved ASB clubs. Even assuming that non-Christians would be able to comply with Truth's view of "Christian character, Christian speech, Christian behavior and Christian conduct," we hold that the requirement that members possess a "true desire to . . . grow in a relationship with Jesus Christ" inherently excludes non-Christians.

[11] Having determined that the third charter violates the District's non-discrimination policies, we are led to hold that the District's denial of ASB recognition on this account would be consistent with the Act. The Act requires federally-funded schools that have created a limited open forum to grant religious clubs benefits and privileges afforded to all other non-curriculum clubs. *See Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 235-36 (1990); *Prince*, 303 F.3d at 1081 ("[T]he term 'equal access' means what the Supreme Court said in *Widmar* [*v. Vincent*, 454 U.S. 263, 267-71 (1981)]: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities . . ."). *Prince* held

that the rights protected under the Act include equal access to some of the benefits associated with ASB status, including ASB funding and public communication techniques. 303 F.3d at 1084-90. The District does not argue that it is not required under the Act to provide equal access to the ASB program.

In interpreting the Act, we begin with its plain language. "Where the intent of Congress has been expressed in reason-ably plain terms, that language must ordinarily be regarded as conclusive." *Id.* at 1079 (internal quotations and citation omitted). Where there may be uncertainty, however, we rely on the Supreme Court's direction that the Act is to be "interpreted broadly," *Mergens*, 496 U.S. at 239, as well as cases deciding analogous issues under the First Amendment. *Cf. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 855-56 (2d Cir. 1996) (adopting similar approach).

[12] By its plain terms, the Act prevents only denials of access or fair opportunity or discrimination "on the basis of the religious, political, philosophical, or other content of the speech at [a club's] meetings." 20 U.S.C. § 4071(a). Therefore, once it is established that the secondary school receives federal funds and has created a limited open forum, the club must demonstrate two additional elements to prevail: 1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the "content of the speech" at its meetings.

[13] The District denied Truth ASB status, at least in part, based on its discriminatory membership

criteria, not the religious "content of the speech."[1] The Act does not define "con-tent of the speech," but that phrase has a particular meaning in First Amendment jurisprudence. We have held that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (quotations and citation omitted). Similarly, a "restriction on expressive activity is content-neutral if it is... based on a nonpretextual reason divorced from the content of the message attempted to be conveyed." *Id.* (quotations and citation omitted).

The Act, through which Congress extended the reasoning of the Supreme Court's 1981 decision in *Widmar v. Vincent* to secondary schools, *see Mergens*, 496 U.S. at 235, tracks *Widmar*'s emphasis on discrimination based on the content of the plaintiff's speech. *Widmar* struck down a state university's regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." 454 U.S. 263, 265 (1981). *Widmar* thus precluded a university's "discriminatory exclusion from a public forum based on the religious content of a group's intended

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[1] Although the District gave several reasons for denying Truth's charter, some of which appear to have been based on the content of Truth's speech, the district court based its analysis only on the group's discriminatory membership policies. Therefore, we too limit our analysis to this issue when determining whether the district court's summary judgment was appropriate.

speech," *id.* at 269-70, but not its "right to exclude . . . First Amendment activities that violate reasonable campus rules." *Id.* at 277. Likewise, the Act prevents a school's unreasonable limitation on the conduct of a club to the extent the limitation is justified with reference to the expressive content of the regulated conduct. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech" (internal quotations and citation omitted)).

[14] Congress could have written the Act to protect religious clubs against a burden on their speech or activities, but did not. For example, when Congress passed the Religious Land Use and Institutionalized Persons Act, it not only prohibited discrimination against religious groups as such but also limited governments' abilities to impose even neutral, nondiscriminatory policies against them:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the bur-den on that person, assembly, or institution—
>
> > (A) is in furtherance of a compelling governmental interest; and

> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Thus, Congress knows how to draft a statute placing otherwise content-neutral laws of general applicability that incidentally burden a First Amendment activity under the same judicial scrutiny as laws specifically targeting the religious content of a group's expression. *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 985-86 (9th Cir. 2006). That is not the case here. The Act clearly allows exclusions that are not "content"-based.

[15] The Act's legislative history strengthens our conclusion that it prohibits only content-based restrictions on religious groups. The legislative history focuses on Congress's intent to end school districts' previous practices of treating religious groups inequitably and forbidding them from meeting on campus. *See* S. Rep. 98-357, at 6, 1984 U.S.C.C.A.N. 2348, 2352 (1984) ("Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an [e]xtracurricular activity"); *id.* at 15, 1984 U.S.C.C.A.N. at 2361 ("[S]chool authorities across the country are banishing religious clubs from campus or placing such onerous restrictions on them that meetings become almost impossible"). The Senate Report recognized the possibility that religious groups like Truth might claim that content neutral policies regulating club membership violate the Act, and disclaimed any such intent:

> At the same time, the guarantee of equal access does not require special treatment for religious groups. Religious groups are accorded only the same rights and privileges as are granted to other student groups. In practice, however, this means that not all student groups would receive exactly the same privileges. There could be many neutral and impartial time, place, and manner restrictions placed on the use of school facilities which might produce situations in which some voluntary groups would not receive precisely the same access received by others. . . . The access determination could not be made, however, on the basis that the nature of the activity was religious.

Id. at 39, 1984 U.S.C.C.A.N. at 2385. The District's non-discrimination policies are not time, place or manner restrictions. But like such restrictions, the policies are content-neutral. This strongly suggests that Congress did not intend the Act to apply to non-discrimination policies.

[16] The parties do not dispute that the Kent School District receives federal funding, or that Kentridge has created a limited open forum for extracurricular student groups. The District contests, however, whether the Act's guarantee of equal access, fair opportunity, and non-discrimination protects Truth's freedom to exclude those who do not share Christian values from its general membership. On their face, the District's non-discrimination policies do not preclude or discriminate against religious speech. Truth also has

not shown that the District justifies its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content-neutral. Therefore, to the extent they proscribe Truth's discriminatory general membership restrictions, the policies do not implicate any rights that Truth might enjoy under the Act. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (holding that a statute or regulation that conditions government benefits on a non-discriminatory campus access policy is properly categorized as conduct, not speech).

Our decision is not inconsistent with that of the Second Circuit, which has focused on the term "speech" in the Act rather than the content-neutrality (or lack thereof) of school policies. *See Hsu*, 85 F.3d at 856 (rejecting argument that Act was not implicated because "the School did not base its qualified recognition of the Club on what would be said at the Club meetings, but on what could be characterized as the Club's 'act' of excluding non-Christians from leadership"); *id.* at 859 (Act triggered "when an after-school religious club excludes people of other religions from conducting its meetings . . . to protect the expressive content of the meetings"). The court's decision in *Hsu* is readily distinguishable from the case at hand. In *Hsu*, a Christian group was seeking to impose a religious test for all of its *leadership* positions. *Id.* at 849. The court held that the group's ability to exclude non-Christians from some, but not all, of these leadership positions constituted "speech" within the meaning of the Act. *Id.* at 858. In contrast, we are only

concerned with Truth's *general* membership requirements. The Second Circuit's decision in *Hsu* directly supports our holding with respect to these requirements. The court held that "a religious test for membership or attendance" would be "plainly insupportable," since "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." *Id.* at 858 & n.17.

[17] In short, Truth has not shown that the District's non-discrimination policy restricts ASB status on the basis of religion or the religious content of speech. Truth also argues, however, that the District violated the Act by allowing certain groups an *exemption* from the non-discrimination policy. Here we understand Truth to be challenging an allegedly arbitrary or discriminatory practice of granting waivers to non-religious groups, but not religious groups. This challenge is different in kind from one asserting that the application of the non-discrimination policy to Truth violates Truth's rights under the Act. If indeed the District has a policy of enforcing the non-discrimination policy only against religious groups, this policy would of course violate the Act. Many of the so-called 'exemptions' that Truth contests are in fact consistent with the District's non-discrimination policy. For example, several clubs, such as the EarthCorps and the Gay-Straight Alliance, require their members to support a specific political cause, but nothing in the District's non-discrimination policy prohibits discrimination on the basis of political belief. However, at least two groups, the Men's Honor Club and the Girl's Honor Club, were granted ASB recognition even though

their membership is based on gender, a protected ground under the District's policy. There is no evidence in the record as to why these groups were allowed apparent waivers from the District's non-discrimination policy. Thus, to the extent Truth alleges that the District provided waivers to these groups while denying them to others, and that decision was made on the basis of religion or the religious content of speech, Truth has raised a triable issue of fact.[2]

Therefore, we reverse the district court's summary judgment and remand for further proceedings on this limited issue.

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[2] Although Truth has raised a triable issue of fact, we call attention to two potential problems with its argument. First, Congress has specifically allowed for "separate but equal" gender discrimination in the context of school and youth activities. *See* 20 U.S.C. § 1681(a)(6) (providing that gender discrimination is allowed with regard to certain social fraternities and sororities and volunteer youth organizations that have traditionally been limited to one sex). Therefore, that the District exempts the Men's and Girl's Honor Clubs from its overarching gender discrimination policy does not, by itself, suggest an arbitrary or discriminatory application of that policy so as to violate the Act. Second, another high school and a junior high school in the District have granted ASB recognition to other Bible groups that do not discriminate in their membership criteria, making it even less likely that the District's application of its anti-discrimination policy in this case was merely a pretext for religious animus. Nevertheless, because the record is devoid of any evidence as to the actual reason that the District granted a non discrimination waiver to the Men's and Girl's Honor Clubs, we must remand for further proceedings.

B.

[18] We next address whether, and if so how, the First Amendment may apply where a school denies ASB recognition to a student club based on its membership criteria. As an initial matter, it is important to emphasize that the members of Truth are not seeking merely to associate as a group; they are seeking to associate as a *school-sponsored* group. Specifically, ASB recognition would give Truth access to ASB funds, additional access to the school's property and facilities, and special rights to post materials around the school. Therefore, we must evaluate the District's denial of ASB recognition as a restriction on a "limited public forum." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (applying limited public forum analysis to religious group's request for student activities funds); *see also Prince*, 303 F.3d at 1091 (holding that a school, through its ASB program, "created a limited public forum"). The limited public forum framework "has been the source of much confusion" and the precise contours of the term "have not always been clear." *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (internal quotations and citation omitted). The Supreme Court first addressed the concept, indirectly, in *Widmar*. The Court recognized that, although the state is not required to open certain fora to public discourse, once it elects to do so, it "assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267-68. Two years later, in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 44-45 (1983), the Supreme Court

clarified that there are three categories of government-run fora. "At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public." *Id.* at 45 (internal quotations omitted). On the opposite end of the spectrum are those government properties that have not been traditionally considered open to the public. *Id.* at 46. Finally, falling somewhere in between are limited public fora, which "consist[ ] of public property which the state has opened for use by the public as a place for expressive activity." *Id.* at 45.

[19] In *Rosenberger*, the Supreme Court held that the government may exclude speech in a "limited public forum," so long as its reasons for doing so are viewpoint neutral and "reasonable in light of the purpose served by the forum." 515 U.S. at 829 (quotations and citation omitted). Access to ASB recognition qualifies as a limited public forum. *See Prince*, 303 F.3d at 1091. Therefore, we must consider whether the District's policy of restricting access to the ASB forum based on compliance with its non-discrimination policy is viewpoint neutral and reasonable in light of the purposes of the forum.

[20] The ASB Constitution makes it clear that the purpose of the organization "is to develop attitudes of and practice in good citizenship within the school; to promote harmonious relations between students, clubs, and activities; and to act as a forum for student and faculty expression." The constitution further states that this purpose will be carried out by "[h]elping the student body develop a regard for law and order by obeying, honoring, and sustaining

the laws of Washington State and King County, as well as the rules of Kentridge Senior High School. . . ." These broad statements of purpose show that the purpose of the ASB program is to advance the school's basic pedagogical goals. The Supreme Court has emphasized that part of a school's mission is to instill in students the "shared values of a civilized social order," which includes instilling the value of non-discrimination. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). Therefore, the District's decision to restrict access to the ASB program based on a group's willingness to adhere to the school's non-discrimination policy is reasonable in light of the purposes of the forum.

Because this policy was reasonable in light of the purposes served by the ASB, we must next consider whether the group's exclusion was viewpoint neutral. The Supreme Court has explained that "[v]iewpoint discrimination is . . . an egregious form of content discrimination," and occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis added); *see also Perry Educ. Ass'n*, 460 U.S. at 46 (regulation on access to a forum is not viewpoint neutral if it is "an effort to suppress expression merely because public officials oppose the speaker's view"). In cases where restriction to the forum is based solely on the group's religious viewpoint, the restriction is invalid. This was the case in *Prince*, where the school refused to recognize the school group World Changers "based purely on the [group's] religious viewpoint." 303 F.3d at 1091.

[21] Here, in contrast, the school is not denying Truth access based solely on its religious viewpoint, but rather on its refusal to comply with the District's non-discrimination policy. The District was therefore not engaging in viewpoint discrimination; the "perspective of the speaker" was not the "rationale" for denying Truth access to the limited public forum. *See Rosenberger*, 515 U.S. at 829. Applying the non-discrimination policy to exclude Truth does not show that the school administrators acted "merely because [they] oppose the speaker's view." *Perry*, 460 U.S. at 46. In short, the District no more engaged in viewpoint discrimination by excluding Truth for refusing to comply with its non-discrimination policy than it would have engaged in viewpoint discrimination by refusing to grant ASB status to a Student Pro-Drug Club that refused to obey the school's anti drug policy. *Cf. Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007) (holding that schools may censor even *private* student speech that occurs on school grounds that "they reasonably regard as promoting illegal drug use").

[22] This conclusion, of course, rests on the premise that the ASB actually denied Truth's recognition based on its failure to comply with the District's non-discrimination policy. There is evidence in the record that other groups, such as the Men's and Girl's Honor Clubs, were granted ASB recognition despite violating the District's non-discrimination policy. Therefore, to the extent Truth argues that it was denied an *exemption* from the non-discrimination policy based on the content of its speech, we hold it has raised a triable issue of fact, and reverse the district court's summary judgment.

V.

[23] Truth also makes a claim under the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. The district court did not explicitly reach these claims, on the grounds that Truth's "cursory Equal Protection Clause, Establishment Clause, and Free Exercise arguments are all subsumed within their First Amendment argument . . . ." On appeal, Truth continues to give cursory treatment to these claims. Nevertheless, Truth may have a valid argument. As discussed earlier, we are remanding to the district court to determine whether Truth was denied an exemption from the District's non-discrimination policy, and whether that denial was based on religion or the content of Truth's speech. To the extent Truth can make out a colorable First Amendment violation on these grounds, it may also have a Free Exercise claim, since "the Supreme Court noted that free exercise claims implicating other constitutional protections, such as free speech, could qualify for strict scrutiny review . . . ." *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). Moreover, if Truth can demonstrate that it was singled out for unequal treatment on the basis of religion, it may also have a potentially valid Equal Protection or Establishment Clause argument. Therefore, we remand these issues to the district court to be considered along with the exemption issue discussed previously. Finally, the District has argued that the ASB has free speech rights that would be violated if it were compelled to recognize Truth as an ASB organization. The ASB is not a party to this appeal and there is no indication that

the District has authorization from the ASB to assert any such First Amendment claims. We conclude that the District lacks prudential standing to assert the ASB's free speech rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (quotations and citation omitted)).

VI.

It is prudent to address only those issues necessary for our decision on the third charter application. We hold only that the District did not violate the Act or Truth's First Amendment rights by applying its non-discrimination policy to require Truth to remove its general membership provision. To the extent Truth alleges that the District violated the Act or the First Amendment by refusing to provide an exemption to its non-discrimination policy—based on Truth's religion or the content of its speech—we reverse the district court's summary judgment, and remand for further proceedings.

REVERSED AND REMANDED.

FISHER, Circuit Judge, concurring, joined by Judge WARDLAW:

We write separately to amplify on one issue discussed in our main opinion. Truth argued that it must be granted access to the ASB forum because

conditioning its access to the ASB program on a change to its discriminatory membership policy would infringe its right to engage in speech through "expressive association." Expressive association may be burdened when the state requires a group to change its membership criteria, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), or when the state conditions access to a traditional public forum upon such changes, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). When the use of school facilities is part of a general public forum, denying access to those facilities may also implicate the right to associate freely. *See Healy v. James*, 408 U.S. 169, 180-81 (1972) (noting that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' " and that the complete "denial of use of campus facilities for meetings and other appropriate purposes" implicated a group's right to expressive association).

Even assuming, however, that Truth's exclusion of non-Christians allows it to engage in speech through expressive association, its exclusion from the ASB program on account of its discriminatory policy does not infringe its rights under the First Amendment. As our opinion explains, when the state creates a *limited* public forum, like the ASB program at issue here, it may restrict access to that forum so long as the restrictions are "viewpoint neutral and reasonable in light of the purpose served by the forum," even if these rules have the effect of limiting a group's ability to engage in protected speech, such as the right to speak, publish on a particular topic or

engage in expressive association. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for *certain groups* or for the discussion of certain topics." (emphasis added)).

We reject Truth's suggestion that state action that burdens a group's ability to engage in expressive association must always be subject to strict scrutiny, even if the group seeks to engage in expressive association through a limited public forum. Expressive association is simply another way of speaking, only the group communicates its message through the *act of associating* instead of through an act of "pure speech" such as publishing, marching, speaking or performing. *See Dale*, 530 U.S. at 648 (holding that the First Amendment protects a group's ability to exclude members, if including such members would "impair the ability of the group to express those views, and only those views, that it intends to express"). There is no question that acts of expressive association are protected forms of speech under the First Amendment. *See id.* at 656; *Hurley*, 515 U.S. at 579. When the state *restricts access to a limited public forum* in a way that interferes with a group's speech or expressive association, however, we apply the lesser standard of scrutiny, even if the same burden on a group's rights *outside* a limited public forum would be subject to strict scrutiny. *See Rosenberger*, 515 U.S. at 829-30 (applying limited public forum analysis to a university policy that excluded a group's access to the school's student activity fund, thereby preventing it from publishing

a newspaper). To hold otherwise would accord an act of "pure speech" such as publishing a newspaper — the core of what the First Amendment protects — less protection than an act of expressive association. We find no support for such a proposition, and Truth has identified none.[3] Truth, of course, has the option of operating as a Policy 2153 group on school grounds, *see* 524 F.3d at 963, and as such would be able to restrict its membership unfettered by the school's non-discrimination policy. If Truth wants the additional benefits that come from participation in the ASB program, however, Truth must comply with the school's reasonable, viewpoint-neutral rules.

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[3] In *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006), the Seventh Circuit reversed the denial of a preliminary injunction, holding that a university group had shown that it was "reasonably likely to succeed on the merits" of its First Amendment claim after being excluded from campus for violating the school's nondiscrimination policy, which the group claimed infringed its right to expressive association. Although the Seventh Circuit applied strict scrutiny in addressing this claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum. *See id.* at 866 ("Whether SIU's student organization forum is a public, designated public, or nonpublic forum is an inquiry that will require further factual development, and that is a task properly left for the district court.") *Walker* did not say that strict scrutiny would be appropriate in *all* cases, even if the university had created something less than an open forum

FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRUTH, an unincorporated association; SARICE UNDIS, a minor, by and through her father, LARRY UNDIS; JULIANNE STEWART, a minor, by and through her parents, PAUL and ANNA STEWART,

Plaintiffs-Appellants,

v.

KENT SCHOOL DISTRICT; BARBARA GROHE, Superintendent of Kent School District; MIKE ALBRECHT, Principal of Kentridge High School; ERIC ANDERSON, Assistant Principal of Kentridge High School, in their official capacities,

Defendants-Appellees.

No. 04-35876

D.C. No. CV-03-00785-MJP

ORDER AND OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted
July 27, 2006—Seattle, Washington

Filed April 25, 2008
Before: J. Clifford Wallace, Kim McLane Wardlaw, and

Raymond C. Fisher, Circuit Judges.

Opinion by Judge Wallace

COUNSEL

Robert H. Tyler, Alliance Defense Fund, Murrieta, California, for the plaintiffs-appellants.

Michael B. Tierney, Mercer Island, Washington, for the defendants-appellees.

Jane M. Whicher, Port Townsend, Washington, for amicus American Civil Liberties Union.

Sara J. Rose, Washington, D.C., for amicus Americans United for Separation of Church and State.

David F. McDowell, Los Angeles, California, for amicus Anti-Defamation League.

ORDER

The opinion filed on August 24, 2007 is hereby withdrawn and replaced by this concurrently filed opinion. The petition for rehearing en banc is denied as moot.

OPINION

WALLACE, Circuit Judge:

Appellants Truth, Sarice Undis, and Julianne Stewart (collectively, Truth) appeal from a summary judgment in favor of the Kent School District and other appellees (collectively, District). Truth alleges violations of the Equal Access Act (the Act), the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand.

I.

This appeal arises from Truth's attempt to form a student club at Kentridge High School (Kentridge), which is part of the Kent School District. Under the relevant policies at Kentridge, "[u]nchartered clubs are not permitted to exist." To obtain a charter, students must submit a proposed charter to the Associated Student Body (ASB) Council and secure approval.

Beginning in the fall semester of 2001, appellants Undis, then a junior, and Stewart, then a sophomore, attempted to form a Bible club at Kentridge. Undis and Stewart submitted a "Club Charter Application" (first charter) for official recognition as an ASB organization in September 2001. This first charter indicated that the club's name was to be "Truth" and that the purpose of the organization was to "have a Bible study to encourage and help become better people with good morals."

Under the section "Membership Criteria," the first charter indicated that the group was to be "[o]pen to anyone." The charter also proposed that it would designate a "quote of the week for announcement" and "once a month decorate [the] school with a theme."

The ASB Council discussed Truth's first charter at a September 2001 meeting, and several students objected to chartering Truth. The ASB Council decided to consult with the Assistant Principal, appellee Eric Anderson. Anderson and appellee Mike Albrecht, Principal of Kentridge, later told Undis that they would speak with the school's attorney regarding the legality of granting Truth ASB recognition. Albrecht stated that "the problem with the September 2001 proposal was that it involved broadcasting a weekly Bible quote over the school's public address system and monthly decoration of the school in a biblical theme."

No action was taken on the first charter for the remainder of the 2001-02 school year. During that time, Undis asked Anderson to make a decision on Truth's application on at least ten occasions, to no avail. Sometime in the spring semester of 2002, all ASB clubs were instructed to resubmit their charters. The record does not reveal any further activity on Truth's application during the summer and fall semesters of 2002.

During this period, we decided *Prince v. Jacoby*, which involved a request by a Bible club for ASB recognition in a different Washington school district. 303 F.3d 1074 (9th Cir. 2002). On January 7, 2003,

an attorney for Truth, Robert Tyler, wrote to Albrecht stating that it was "constitutionally imperative that [Kentridge] grant [appellants'] proposed Bible Club treatment and rights equal to all other noncurriculum clubs." The letter also insisted that Kentridge "immediately adhere to the requirements of the Equal Access Act and the First Amendment," and threatened litigation if Kentridge did not comply.

On January 30, 2003, Tyler sent a second letter to Michael Harrington, counsel for the Kent School District. Tyler requested the forms required to establish an ASB club, and threatened litigation if Truth's charter was not approved by February 4.

On February 2, as requested by Anderson, Undis and Stewart submitted a new application (second charter). The second charter removed the quote-of-the-week and monthly theme decoration provisions of the first charter. The club's stated purpose was now to "provid[e] a biblically-based club for those students interested in growing in their relationship with Jesus Christ." Although membership would be open to all students, the second charter restricted voting membership to "members professing belief in the Bible and in Jesus Christ." Officers would also be required to "believe in and be committed to biblical principles."

After a third letter to Harrington from Tyler, the second charter was discussed at an ASB Council meeting on March 27. Some students expressed disapproval of the club's name, suggesting that it "implies that every other religion at Kentridge is a

lie." Some council members also expressed concerns that granting the charter would violate "[c]hurch and state" and that the voting membership should be open to everyone. Additionally, members suggested that students could go to "Young Life," a non-ASB recognized organization that met on Kentridge's campus after school hours. The minutes of the March 27 meeting reveal that the question of whether to approve the second charter was discussed for twenty minutes. No vote was taken.

The second charter was next addressed at an ASB Council meeting on April 1. After a brief clarification on the role of the advisor for the club, the minutes show that Anderson stated that if the ASB Council voted to approve the charter, he would consult the District's attorneys and Kentridge would make a final decision on approving the charter. The Counsel voted eleven to six against approval of Truth's second charter.

On April 3, Truth filed a complaint in the United States District Court for the Western District of Washington, alleging that defendants had violated the Act, as well as the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. Truth sought injunctive and declaratory relief as well as nominal damages.

On April 9, Anderson sent Stewart a letter informing her of her right to resubmit Truth's application for ASB club recognition: "As was discussed at the ASB meeting on March 28th, by making minor changes to Article[s] I and III of the

proposed Constitution for your club, you will address the points raised." Article I sets forth the name of the club and Article III contains the voting membership and officer restrictions. Anderson advised Stewart to "be prepared to resubmit by the April 25th ASB Meeting." Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected."

Stewart and Undis submitted the third charter on April 24. The third charter maintains the proposed name "Truth." However, it divides the membership into three categories: voting members, non-voting members, and attendees. Meetings are open to everyone. But the "privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." The charter faith requires the person to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God." A voting member must also pledge that he or she believes "that salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Other than the ability to call oneself a "member," there is no difference between the rights of non-voting members and attendees.

The third charter was discussed at the April 25 ASB Council meeting. The ASB Council again objected to the name, selectivity provisions, and the

presence of religion in school. The council voted nineteen to zero to deny approval of the charter, with one member undecided. The minutes give four reasons why the charter was not accepted: 1) "Name," 2) "Pledge to vote," 3) "Segregating," 4) "Religious club in school."

On May 6, Tyler wrote to the Kent School District's counsel stating that it was his "understanding from the ASB Constitution that this rejection by the ASB is the final decision." The letter also provided that Tyler "was unable to locate any rights to appeal the decision of the ASB," but that if there were "a right to appeal the decision of the ASB," he asked that the letter "serve as a formal request for appeal."

Anderson advised Undis and Stewart in a May 12 letter "that pursuant to Kent School District Policy 2340, [they had] the ability to discuss this matter with Mr. Albrecht," and mentioned the possibility of discussions with the District superintendent or the ombudservices office. Although Tyler's May 6 letter would appear to have invoked these processes, no further action was taken by the District. Policy 2340 concerns "religious related activities or practices." The policy does not refer to ASB recognition, and the ASB Constitution does not refer to this policy as providing an avenue for an appeal of the District's decisions, which are otherwise "final."

Although Undis and Stewart have both graduated from Kentridge, they have indicated that another student, Lindsay Thomas, is prepared to assume leadership of the club if the charter is approved.

The Kent School District has three policies relevant to this appeal. First, Policy 3210 provides that "[t]he district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status, previous arrest . . . , incarceration, or physical, sensory or mental disabilities." The district court held that inclusion of "creed" indicates that discrimination based upon religion is prohibited. That ruling has not been challenged on appeal.

Second, Policy 2153 provides for "noncurriculum-related, non ASB student groups," which groups the principal shall approve provided they meet several additional requirements, such as that they do not disrupt the school environment. While Policy 2153 groups may meet on school grounds before or after school, these groups do not receive other benefits accorded only to ASB-sponsored student clubs. Most significantly, only ASB-chartered groups may receive ASB funding and engage in purchasing through the Kent School District Finance Department. Each ASB club is provided with a faculty advisor or adult advisor designee, who must be present at all club meetings and assists in the planning and handling of the club's affairs. ASB clubs are also allowed to conduct meetings during noninstructional time, advertise their activities in school, use the public address system, and are recognized in the school yearbook. The District states that Truth "is free to operate as a private Policy 2153 group," but argues that Truth was properly denied ASB recognition.

Third, Policy 2340P regulates "religious related activities or practices," and provides guidelines for schools addressing religious holidays, symbols, ceremonies, topics, activities, and beliefs. This policy also provides that "[s]tudents, parents, and employees who are aggrieved by practices or activities conducted in the school or district may seek resolution of their concern first with the building principal, then with the district superintendent or designee, or use ombudservices, which is available through the Legal Services Department."

Washington State also has a relevant non-discrimination law, which the District relies on to justify its denial of ASB recognition for Truth. In 2003, Washington Revised Code § 49.60.215 (West 2006) provided that:

> It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, . . . or the refusing or withholding from any person the admission, patron-age, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a

> trained dog guide or service animal by a disabled person.

The District has argued that these non-discrimination policies require it to deny ASB recognition to Truth.

As of April 3, 2003, there were thirty ASB-recognized clubs at Kentridge. While the record does not contain the charters of all the clubs, it appears that many of them have selective membership criteria. Indeed, each charter application contains a section for "Membership Criteria."

The EarthCorps, for example, requires members to show "interest and dedication toward environmental issues." Similarly, the Key Club requires that members be "interested in service, qualified scholastically, of good character, possessing leadership potential . . . [and] willing to perform at least fifty hours of . . . service." The Gay-Straight Alliance requires that students "must be willing to work towards the goals of the club" to be members. These goals include "bring[ing] GLBTQ [Gay, Lesbian, Bisexual, Transgendered, and Questioning] issues into the open, while working to decrease homophobia." Other goals include "changing stereotypes" and "fight[ing] heterosexism and other forms of oppression." The National Honor Society selects its members based on "outstanding scholarship, character, leadership, and service," and requires them to "behave in a courteous and respectful manner, refraining from language and actions that might bring discredit upon themselves." It also requires members to refrain from using or

possessing alcohol or illegal substances. Participation in school sports requires maintaining a certain grade point average and attendance record, not using drugs or alcohol, and complying with the "sports code." Finally, a Men's Honor Club and a Girl's Honor Club also operate at Kentridge as ASB-recognized groups. Each club has gender-exclusive membership.

The district court entered summary judgment on all of Truth's claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), with the exception of the Act claim. The court held that the requirements of municipal liability under 42 U.S.C. § 1983 were not satisfied, and therefore entered summary judgment in favor of the District. It also held that the actions against the individual defendants in their official capacities were functionally equivalent to suits directly against the municipality, and therefore Truth's claims against them failed.

The district court ruled on the merits of the Act and some of the First Amendment claims, addressing the latter as an alternate holding if its *Monell* ruling were to be reversed. It held that the restrictions on general membership in the third charter constituted a legitimate basis for denying the third charter and that these claims therefore failed.

The district court did not rule on the remaining claims based on its belief that "Plaintiffs' cursory Equal Protection Clause, Establishment Clause, and Free Exercise Clause arguments are all subsumed within their First Amendment argument." The

district court also did not address the District's argument that granting ASB recognition to Truth would violate the Establishment Clause.

On appeal, both sides agree that only the third charter is before us. Truth makes this concession even though this action was filed before the third charter and its complaint only addresses the denial of its second charter.

This appeal requires us to review many determinations by the district court. As to each issue, we review de novo. We review a district court's summary judgment de novo. *See Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). In deter-mining whether summary judgment was appropriate, we view the evidence in the light most favorable to Truth, the non-moving party. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). "We may affirm on any ground supported by the record." *Id.* We also review de novo the district court's *Monell* rulings, *see Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir. 2003), its "decision regarding the scope of a constitutional right," *see United States v. Napier*, 436 F.3d 1133, 1135-36 (9th Cir. 2006), and its interpretation of the Act, *see SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003).

II.

Before addressing the merits, we consider our jurisdiction. The District argues that Truth lacks standing under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), because Truth has failed to meet the "likelihood of recurrence" requirement. The District

asserts that Truth "cannot say the ASB or the District will always deny another Club application or even the same application."

[1] In order to establish Article III standing,

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). Although the District has not made any arguments regarding these specific factors, we have an independent obligation to address whether we have subject-matter jurisdiction. *See Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

[2] With respect to injunctive relief, the Supreme Court has also required that a plaintiff show that "he is realistically threatened by a repetition of [the violation]." *Lyons*, 461 U.S. at 109. "The plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such

recurrence is probable." *Jones v. City of Los Angeles*, 444 F.3d 1118, 1127 (9th Cir. 2006), *citing Honig v. Doe*, 484 U.S. 305, 318 & n.6 (1988). While we have extended this requirement to declaratory relief, *see Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006), it does not apply to monetary damages, *see Lyons*, 461 U.S. at 105. The District's standing argument therefore does not implicate Truth's standing to seek nominal damages.

The District asserts that the Establishment Clause, state law, and its own non-discrimination policies mandate that it deny ASB recognition to Truth. If the District believes that three independent and binding legal authorities compel it to deny Truth's application, we do not see how the District might approve the same or a similar charter request in the future.

[3] The District's written non-discrimination policies also support Truth's standing arguments. We have held that plain-tiffs "may demonstrate that an injury is likely to recur by showing that the defendant had . . . a written policy, and that the injury 'stems from' that policy. Where the harm alleged is directly traceable to a written policy there is an implicit likelihood of its repetition in the immediate future." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (internal quotations and alterations omitted). Here, the harm is traceable to the District's policies, which the District has argued compel it to deny ASB recognition to Truth.

Additionally, despite Tyler's request that the District treat his letter as a "formal request for appeal," the District took no action. This is evidence that another charter request is likely to meet the same fate as the previous three. Finally, the District has provided nothing beyond its own speculation that the outcome might be different if Truth submitted a fourth charter. The legal positions it has taken in this litigation strongly suggest that no similar applications will ever be approved.

[4] Under these circumstances, we conclude that Truth has established at least a genuine issue of material fact as to whether there is a reasonable expectation that the alleged injury will recur. Therefore, Truth has standing to seek each of its requested forms of relief.

The District also suggests that this dispute is not ripe for review, and that we thus lack jurisdiction, because Truth did not bring the dispute to the Kent School District Board or Superintendent through Policy 2340P. The District is wrong. The Supreme Court has explicitly held that exhaustion is not required for claims brought under 42 U.S.C. § 1983. *See Steffel v. Thompson*, 415 U.S. 452, 472 73 (1974). Exhaustion cannot be dispositive under a ripeness analysis; otherwise ripeness doctrine would impose a *de facto* exhaustion requirement, in violation of *Steffel*. Thus, the alleged failure to exhaust administrative remedies may be at most only a factor in the ripeness analysis.

[5] Nevertheless, it appears that Truth did exhaust the formal appeal system. Tyler's May 6 letter to the

District's counsel asked that the letter "serve as a formal request for appeal." The District has not provided any reason why this notification was not sufficient to trigger its appeals process, and no reason is apparent in the record. The District's failure to take any action as a result of this request does not indicate that Truth failed to bring the matter to the attention of the District. Under these circumstances, there is at least a genuine issue of material fact as to whether Truth exhausted the District's grievance procedures.

Nearly every other factor suggests that this case is ripe for decision. Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected." The ASB Constitution neither provides for any additional review, nor suggests that the ASB Council's decision lacked finality.

Furthermore, there is no doubt that the effects of the denial of Truth's charter have been felt in a concrete way by the appellants. Truth's members have experienced three denials of their applications, as well as protracted delays in obtaining any action from the ASB Council and District. The harm that Truth has complained of does not "rest[ ] upon contingent future events" or ones that "may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation omitted). Instead, Truth complains of discrete events that have already occurred.

[6] Finally, "in evaluating ripeness, courts assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir. 2000) (internal quotation omitted). We conclude the hardship to Truth in denying adjudication outweighs the hardship to the District in deciding this appeal. Truth's application for ASB recognition languished for nearly sixteen months without any significant action being taken, and the ASB process appears to have stalled until Truth obtained counsel and threatened to sue. More than five years have passed since the submission of the first charter, and declining to decide this appeal now would present a significant hardship to appellants.

[7] By contrast, the hardship to the District is significantly less severe. The District has been aware of Truth's arguments for a long time and has had ample opportunity to take corrective action or change its policies, if it so desired. Its legal positions on appeal show that it does not believe any remedial action is appropriate and that it believes the denial of ASB recognition was proper. We therefore conclude that this case is ripe for decision.

III.

[8] We must also consider the district court's ruling that the requirements of *Monell* are not met. *Monell* permits section 1983 actions against municipalities, but requires plaintiffs to show that their injuries resulted from "execution of a government's policy or custom, whether made by its lawmakers or by those

whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. *Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here. *See Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989). The District acknowledges the controlling effect of *Chaloux*, but argues that it should be overruled because it "rests on shaky grounds."

[9] It is well established in our circuit that while

> a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law, we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.

Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (internal citation and quotations omitted). The District argues that two Supreme Court cases, *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County*, 520 U.S. 781 (1997), show that the "Supreme Court has re-emphasized the importance and vitality of the doctrine that requires a municipal policy as a precondition to a lawsuit under § 1983." Neither of these cases addresses whether *Monell* applies to actions only seeking prospective relief. We have no authority to overrule *Chaloux*. *Chaloux* applies, and the district court's *Monell* ruling is reversed.

IV.

Relying on its non-discrimination policies, the District points to three aspects of Truth's third charter that justify its decision to deny the club ASB recognition: 1) the general membership restrictions, 2) the leadership and voting membership restrictions, and 3) the name "Truth." The district court granted summary judgment based only on the first justification, and explicitly declined to reach the other two. Accordingly, we too limit our analysis to the general membership restrictions. So long as the District had at least one permissible basis for rejecting Truth's charter, the district court properly granted summary judgment, and we need not address the District's remaining justifications.

We begin our analysis by considering whether the District violated the Act. If we determine that it did not, we then move on to consider whether the District's actions ran afoul of the First Amendment. *See Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002) ("We consider each of Prince's access claims separately, first under the Act, and then the First Amendment, to the extent we find them outside the scope of the Act").

A.

[10] States have the constitutional authority to enact legislation prohibiting invidious discrimination. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624-26 (1984) (reviewing the history of state anti-discrimination laws and observing that a "State enjoys broad authority to create rights of public

access on behalf of its citizens"). Truth asserts that it does not discriminate based on religion in violation of the plain language of the District's policies, but rather imposes a code of conduct not unlike those of other approved ASB clubs. Even assuming that non-Christians would be able to comply with Truth's view of "Christian character, Christian speech, Christian behavior and Christian conduct," we hold that the requirement that members possess a "true desire to . . . grow in a relationship with Jesus Christ" inherently excludes non-Christians.

[11] Having determined that the third charter violates the District's non-discrimination policies, we are led to hold that the District's denial of ASB recognition on this account would be consistent with the Act. The Act requires federally-funded schools that have created a limited open forum to grant religious clubs benefits and privileges afforded to all other non-curriculum clubs. *See Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 235-36 (1990); *Prince*, 303 F.3d at 1081 ("[T]he term 'equal access' means what the Supreme Court said in *Widmar* [*v. Vincent*, 454 U.S. 263, 267-71 (1981)]: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities . . ."). *Prince* held that the rights protected under the Act include equal access to some of the benefits associated with ASB status, including ASB funding and public communication techniques. 303 F.3d at 1084-90. The District does not argue that it is not required under the Act to provide equal access to the ASB program.

In interpreting the Act, we begin with its plain language. "Where the intent of Congress has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Id.* at 1079 (internal quotations and citation omitted). Where there may be uncertainty, however, we rely on the Supreme Court's direction that the Act is to be "interpreted broadly," *Mergens*, 496 U.S. at 239, as well as cases deciding analogous issues under the First Amendment. *Cf. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 855- 56 (2d Cir. 1996) (adopting similar approach).

[12] By its plain terms, the Act prevents only denials of access or fair opportunity or discrimination "on the basis of the religious, political, philosophical, or other content of the speech at [a club's] meetings." 20 U.S.C. § 4071(a). Therefore, once it is established that the secondary school receives federal funds and has created a limited open forum, the club must demonstrate two additional elements to prevail: 1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the "content of the speech" at its meetings.

[13] The District denied Truth ASB status, at least in part, based on its discriminatory membership criteria, not the religious "content of the speech."[4]

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[4] Although the District gave several reasons for denying Truth's charter, some of which appear to have been based on the content of Truth's speech, the district court based its analysis only on the group's discriminatory membership policies. Therefore, we too limit our analysis to this issue when determining whether the district court's summary judgment was appropriate.

The Act does not define "content of the speech," but that phrase has a particular meaning in First Amendment jurisprudence. We have held that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (quotations and citation omitted). Similarly, a "restriction on expressive activity is content-neutral if it is . . . based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *Id.* (quotations and citation omitted).

The Act, through which Congress extended the reasoning of the Supreme Court's 1981 decision in *Widmar v. Vincent* to secondary schools, *see Mergens*, 496 U.S. at 235, tracks *Widmar*'s emphasis on discrimination based on the content of the plaintiff's speech. *Widmar* struck down a state university's regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." 454 U.S. 263, 265 (1981). *Widmar* thus precluded a university's "discriminatory exclusion from a public forum based on the religious content of a group's intended speech," *id.* at 269-70, but not its "right to exclude . . . First Amendment activities that violate reasonable campus rules." *Id.* at 277. Likewise, the Act prevents a school's unreasonable limitation on the conduct of a club to the extent the limitation is justified with reference to the expressive content of the regulated conduct. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is *justified*

without reference to the content of the regulated speech" (internal quotations and citation omitted)).

[14] Congress could have written the Act to protect religious clubs against a burden on their speech or activities, but did not. For example, when Congress passed the Religious Land Use and Institutionalized Persons Act, it not only prohibited discrimination against religious groups as such but also limited governments' abilities to impose even neutral, nondiscriminatory policies against them:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the bur-den on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Thus, Congress knows how to draft a statute placing otherwise content-neutral laws of general applicability that incidentally burden a First Amendment activity under the same judicial scrutiny as laws specifically targeting the religious content of a group's expression. *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 985-86 (9th Cir. 2006). That is not the case

here. The Act clearly allows exclusions that are not "content"-based.

[15] The Act's legislative history strengthens our conclusion that it prohibits only content-based restrictions on religious groups. The legislative history focuses on Congress's intent to end school districts' previous practices of treating religious groups inequitably and forbidding them from meeting on campus. *See* S. Rep. 98-357, at 6, 1984 U.S.C.C.A.N. 2348, 2352 (1984) ("Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an [e]xtracurricular activity"); *id.* at 15, 1984 U.S.C.C.A.N. at 2361 ("[S]chool authorities across the country are banishing religious clubs from campus or placing such onerous restrictions on them that meetings become almost impossible"). The Senate Report recognized the possibility that religious groups like Truth might claim that content-neutral policies regulating club membership violate the Act, and disclaimed any such intent:

> At the same time, the guarantee of equal access does not require special treatment for religious groups. Religious groups are accorded only the same right and privileges as are granted to other student groups. In practice, however, this means that not all student groups would receive exactly the same privileges. There could be many neutral and impartial time, place, and manner restrictions placed on the use of school facilities which might produce situations in which some voluntary groups would not

> receive precisely the same access received by others. . . . The access determination could not be made, however, on the basis that the nature of the activity was religious.

Id. at 39, 1984 U.S.C.C.A.N. at 2385. The District's non-discrimination policies are not time, place or manner restrictions. But like such restrictions, the policies are content- neutral. This strongly suggests that Congress did not intend the Act to apply to non-discrimination policies.

[16] The parties do not dispute that the Kent School District receives federal funding, or that Kentridge has created a limited open forum for extracurricular student groups. The District contests, however, whether the Act's guarantee of equal access, fair opportunity, and non-discrimination protects Truth's freedom to exclude those who do not share Christian values from its general membership. On their face, the District's non-discrimination policies do not preclude or discriminate against religious speech. Truth also has not shown that the District justifies its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content-neutral. Therefore, to the extent they proscribe Truth's discriminatory general membership restrictions, the policies do not implicate any rights that Truth might enjoy under the Act. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (holding that a statute or regulation that conditions government benefits on a non-

discriminatory campus access policy is properly categorized as conduct, not speech).

Our decision is not inconsistent with that of the Second Circuit, which has focused on the term "speech" in the Act rather than the content-neutrality (or lack thereof) of school policies. *See Hsu,* 85 F.3d at 856 (rejecting argument that Act was not implicated because "the School did not base its qualified recognition of the Club on what would be said at the Club meetings, but on what could be characterized as the Club's 'act' of excluding non-Christians from leadership"); *id.* at 859 (Act triggered "when an after-school religious club excludes people of other religions from conducting its meetings . . . to protect the expressive content of the meetings"). The court's decision in *Hsu* is readily distinguishable from the case at hand. In *Hsu*, a Christian group was seeking to impose a religious test for all of its *leadership* positions. *Id.* at 849. The court held that the group's ability to exclude non-Christians from some, but not all, of these leadership positions constituted "speech" within the meaning of the Act. *Id.* at 858. In contrast, we are only concerned with Truth's *general* membership requirements. The Second Circuit's decision in *Hsu* directly supports our holding with respect to these requirements. The court held that "a religious test for membership or attendance" would be "plainly insupportable," since "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." *Id.* at 858 & n.17.

[17] In short, Truth has not shown that the District's non-discrimination policy restricts ASB status on the basis of religion or the religious content of speech. Truth also argues, however, that the District violated the Act by allowing certain groups an *exemption* from the non-discrimination policy. Here we understand Truth to be challenging an allegedly arbitrary or discriminatory practice of granting waivers to non-religious groups, but not religious groups. This challenge is different in kind from one asserting that the application of the non-discrimination policy to Truth violates Truth's rights under the Act. If indeed the District has a policy of enforcing the non-discrimination policy only against religious groups, this policy would of course violate the Act. Many of the so-called 'exemptions' that Truth contests are in fact consistent with the District's non-discrimination policy. For example, several clubs, such as the EarthCorps and the Gay-Straight Alliance, require their members to support a specific political cause, but nothing in the District's non-discrimination policy prohibits discrimination on the basis of political belief. However, at least two groups, the Men's Honor Club and the Girl's Honor Club, were granted ASB recognition even though their membership is based on gender, a protected ground under the District's policy. There is no evidence in the record as to why these groups were allowed apparent waivers from the District's non-discrimination policy. Thus, to the extent Truth alleges that the District provided waivers to these groups while denying them to others, and that decision was made on the basis of religion or the

religious content of speech, Truth has raised a triable issue of fact.[5] Therefore, we reverse the district court's summary judgment and remand for further proceedings on this limited issue.

B.

[18] We next address whether, and if so how, the First Amendment may apply where a school denies ASB recognition to a student club based on its membership criteria. As an initial matter, it is important to emphasize that the members of Truth are not seeking merely to associate as a group; they are seeking to associate as a *school-sponsored* group. Specifically, ASB recognition would give Truth access to ASB funds, additional access to the school's

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[5] Although Truth has raised a triable issue of fact, we call attention to two potential problems with its argument. First, Congress has specifically allowed for "separate but equal" gender discrimination in the context of school and youth activities. *See* 20 U.S.C. § 1681(a)(6) (providing that gender discrimination is allowed with regard to certain social fraternities and sororities and volunteer youth organizations that have traditionally been limited to one sex). Therefore, that the District exempts the Men's and Girl's Honor Clubs from its overarching gender discrimination policy does not, by itself, suggest an arbitrary or discriminatory application of that policy so as to violate the Act. Second, another high school and a junior high school in the District have granted ASB-recognition to other Bible groups that do not discriminate in their membership criteria, making it even less likely that the District's application of its anti-discrimination policy in this case was merely a pretext for religious animus. Nevertheless, because the record is devoid of any evidence as to the actual reason that the District granted a non discrimination waiver to the Men's and Girl's Honor Clubs, we must remand for further proceedings.

property and facilities, and special rights to post materials around the school. Therefore, we must evaluate the District's denial of ASB recognition as a restriction on a "limited public forum." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (applying limited public forum analysis to religious group's request for student activities funds); *see also Prince*, 303 F.3d at 1091 (holding that a school, through its ASB program, "created a limited public forum").

The limited public forum framework "has been the source of much confusion" and the precise contours of the term "have not always been clear." *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (internal quotations and citation omitted). The Supreme Court first addressed the concept, indirectly, in *Widmar*. The Court recognized that, although the state is not required to open certain fora to public discourse, once it elects to do so, it "assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267-68. Two years later, in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 44-45 (1983), the Supreme Court clarified that there are three categories of government-run fora. "At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public." *Id.* at 45 (internal quotations omitted). On the opposite end of the spectrum are those government properties that have not been traditionally considered open to the public. *Id.* at 46. Finally, falling somewhere in between are limited public fora, which "consist[ ] of public property which the state

has opened for use by the public as a place for expressive activity." *Id.* at 45.

[19] In *Rosenberger*, the Supreme Court held that the government may exclude speech in a "limited public forum," so long as its reasons for doing so are viewpoint neutral and "reasonable in light of the purpose served by the forum." 515 U.S. at 829 (quotations and citation omitted). Access to ASB recognition qualifies as a limited public forum. *See Prince*, 303 F.3d at 1091. Therefore, we must consider whether the District's policy of restricting access to the ASB forum based on compliance with its non-discrimination policy is viewpoint neutral and reasonable in light of the purposes of the forum.

[20] The ASB Constitution makes it clear that the purpose of the organization "is to develop attitudes of and practice in good citizenship within the school; to promote harmonious relations between students, clubs, and activities; and to act as a forum for student and faculty expression." The constitution further states that this purpose will be carried out by "[h]elping the student body develop a regard for law and order by obeying, honoring, and sustaining the laws of Washington State and King County, as well as the rules of Kentridge Senior High School. . . ." These broad statements of purpose show that the purpose of the ASB program is to advance the school's basic pedagogical goals. The Supreme Court has emphasized that part of a school's mission is to instill in students the "shared values of a civilized social order," which includes instilling the value of non-discrimination. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). Therefore, the

District's decision to restrict access to the ASB program based on a group's willingness to adhere to the school's non-discrimination policy is reasonable in light of the purposes of the forum.

Because this policy was reasonable in light of the purposes served by the ASB, we must next consider whether the group's exclusion was viewpoint neutral. The Supreme Court has explained that "[v]iewpoint discrimination is . . . an egregious form of content discrimination," and occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis added); *see also Perry Educ. Ass'n*, 460 U.S. at 46 (regulation on access to a forum is not viewpoint neutral if it is "an effort to suppress expression merely because public officials oppose the speaker's view"). In cases where restriction to the forum is based solely on the group's religious viewpoint, the restriction is invalid. This was the case in *Prince*, where the school refused to recognize the school group World Changers "based purely on the [group's] religious viewpoint." 303 F.3d at 1091.

[21] Here, in contrast, the school is not denying Truth access based solely on its religious viewpoint, but rather on its refusal to comply with the District's non-discrimination policy. The District was therefore not engaging in viewpoint discrimination; the "perspective of the speaker" was not the "rationale" for denying Truth access to the limited public forum. *See Rosenberger*, 515 U.S. at 829. Applying the non-discrimination policy to exclude Truth does not show that the school administrators acted "merely because

[they] oppose the speaker's view." *Perry*, 460 U.S. at 46. In short, the District no more engaged in viewpoint discrimination by excluding Truth for refusing to comply with its non-discrimination policy than it would have engaged in viewpoint discrimination by refusing to grant ASB status to a Student Pro-Drug Club that refused to obey the school's anti-drug policy. *Cf. Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007) (holding that schools may censor even *private* student speech that occurs on school grounds that "they reasonably regard as promoting illegal drug use").

[22] This conclusion, of course, rests on the premise that the ASB actually denied Truth's recognition based on its failure to comply with the District's non-discrimination policy. There is evidence in the record that other groups, such as the Men's and Girl's Honor Clubs, were granted ASB recognition despite violating the District's non-discrimination policy. Therefore, to the extent Truth argues that it was denied an *exemption* from the non-discrimination policy based on the content of its speech, we hold it has raised a triable issue of fact, and reverse the district court's summary judgment.

V.

[23] Truth also makes a claim under the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. The district court did not explicitly reach these claims, on the grounds that Truth's "cursory Equal Protection Clause, Establishment Clause, and Free Exercise arguments are all subsumed within their First Amendment

argument . . . ." On appeal, Truth continues to give cursory treatment to these claims. Nevertheless, Truth may have a valid argument. As discussed earlier, we are remanding to the district court to determine whether Truth was denied an exemption from the District's non-discrimination policy, and whether that denial was based on religion or the content of Truth's speech. To the extent Truth can make out a colorable First Amendment violation on these grounds, it may also have a Free Exercise claim, since "the Supreme Court noted that free exercise claims implicating other constitutional protections, such as free speech, could qualify for strict scrutiny review . . . ." *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). Moreover, if Truth can demonstrate that it was singled out for unequal treatment on the basis of religion, it may also have a potentially valid Equal Protection or Establishment Clause argument. Therefore, we remand these issues to the district court to be considered along with the exemption issue discussed previously.

Finally, the District has argued that the ASB has free speech rights that would be violated if it were compelled to recognize Truth as an ASB organization. The ASB is not a party to this appeal and there is no indication that the District has authorization from the ASB to assert any such First Amendment claims. We conclude that the District lacks prudential standing to assert the ASB's free speech rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("[A] party generally must assert his own legal rights and interests, and cannot rest his claim

to relief on the legal rights or interests of third parties." (quotations and citation omitted)).

VI.

It is prudent to address only those issues necessary for our decision on the third charter application. We hold only that the District did not violate the Act or Truth's First Amendment rights by applying its non-discrimination policy to require Truth to remove its general membership provision. To the extent Truth alleges that the District violated the Act or the First Amendment by refusing to provide an exemption to its non-discrimination policy—based on Truth's religion or the content of its speech—we reverse the district court's summary judgment, and remand for further proceedings.

REVERSED AND REMANDED.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRUTH, an unincorporated association; SARICE UNDIS, a minor, by and through her father, LARRY UNDIS; JULIANNE STEWART, a minor, by and through her parents, PAUL and ANNA STEWART,

Plaintiffs-Appellants,

v.

KENT SCHOOL DISTRICT; BARBARA GROHE, Superintendent of Kent School District; MIKE ALBRECHT, Principal of Kentridge High School; ERIC ANDERSON, Assistant Principal of Kentridge High School, in their official capacities,

Defendants-Appellees.

No. 04-35876

D.C. No. CV-03-00785-MJP

OPINION

Appeal from the United States District Court for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted
July 27, 2006—Seattle, Washington

Filed August 24, 2007

Before: J. Clifford Wallace, Kim McLane Wardlaw, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Wallace

COUNSEL

Robert H. Tyler, Alliance Defense Fund, Murrieta, California, for the plaintiffs-appellants.

Michael B. Tierney, Mercer Island, Washington, for the defendants-appellees.

Jane M. Whicher, Port Townsend, Washington, for amicus American Civil Liberties Union.

Sara J. Rose, Washington, D.C., for amicus Americans United for Separation of Church and State.

David F. McDowell, Los Angeles, California, for amicus Anti-Defamation League.

OPINION

WALLACE, Senior Circuit Judge:

Appellants Truth, Sarice Undis, and Julianne Stewart (collectively, Truth) appeal from a summary judgment in favor of the Kent School District and other appellees (collectively, District). Truth alleges violations of the Equal Access Act (the Act), the First Amendment rights of free speech and expressive

association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I.

This appeal arises from Truth's attempt to form a student club at Kentridge High School (Kentridge), which is part of the Kent School District. Under the relevant policies at Kentridge, "[u]nchartered clubs are not permitted to exist." To obtain a charter, students must submit a proposed charter to the Associated Student Body (ASB) Council and secure approval.

Beginning in the fall semester of 2001, appellants Undis, then a junior, and Stewart, then a sophomore, attempted to form a Bible club at Kentridge. Undis and Stewart submitted a "Club Charter Application" (first charter) for official recognition as an ASB organization in September 2001. This first charter indicated that the club's name was to be "Truth" and that the purpose of the organization was to "have a Bible study to encourage and help become better people with good morals." Under the section "Membership Criteria," the first charter indicated that the group was to be "[o]pen to anyone." The charter also proposed that it would designate a "quote of the week for announcement" and "once a month decorate [the] school with a theme."

The ASB Council discussed Truth's first charter at a September 2001 meeting, and several students

objected to chartering Truth. The ASB Council decided to consult with the Assistant Principal, appellee Eric Anderson. Anderson and appellee Mike Albrecht, Principal of Kentridge, later told Undis that they would speak with the school's attorney regarding the legality of granting Truth ASB recognition. Albrecht stated that "the problem with the September 2001 proposal was that it involved broadcasting a weekly Bible quote over the school's public address system and monthly decoration of the school in a biblical theme."

No action was taken on the first charter for the remainder of the 2001-02 school year. During that time, Undis asked Anderson to make a decision on Truth's application on at least ten occasions, to no avail. Sometime in the spring semester of 2002, all ASB clubs were instructed to resubmit their charters. The record does not reveal any further activity on Truth's application during the summer and fall semesters of 2002.

During this period, we decided *Prince v. Jacoby*, which involved a request by a Bible club for ASB recognition in a different Washington school district. 303 F.3d 1074 (9th Cir. 2002). On January 7, 2003, an attorney for Truth, Robert Tyler, wrote to Albrecht stating that it was "constitutionally imperative that [Kentridge] grant [appellants'] proposed Bible Club treatment and rights equal to all other noncurriculum clubs." The letter also insisted that Kentridge "immediately adhere to the requirements of the Equal Access Act and the First Amendment," and threatened litigation if Kentridge did not comply.

On January 30, 2003, Tyler sent a second letter to Michael Harrington, counsel for the Kent School District. Tyler requested the forms required to establish an ASB club, and threatened litigation if Truth's charter was not approved by February 4.

On February 2, as requested by Anderson, Undis and Stewart submitted a new application (second charter). The second charter removed the quote-of-the-week and monthly theme decoration provisions of the first charter. The club's stated purpose was now to "provid[e] a biblically-based club for those students interested in growing in their relationship with Jesus Christ." Although membership would be open to all students, the second charter restricted voting membership to "members professing belief in the Bible and in Jesus Christ." Officers would also be required to "believe in and be committed to biblical principles."

After a third letter to Harrington from Tyler, the second charter was discussed at an ASB Council meeting on March 27. Some students expressed disapproval of the club's name, suggesting that it "implies that every other religion at Kentridge is a lie." Some council members also expressed concerns that granting the charter would violate "[c]hurch and state" and that the voting membership should be open to everyone. Additionally, members suggested that students could go to "Young Life," a non-ASB recognized organi-zation that met on Kentridge's campus after school hours. The minutes of the March 27 meeting reveal that the question of

whether to approve the second charter was discussed for twenty minutes. No vote was taken.

The second charter was next addressed at an ASB Council meeting on April 1. After a brief clarification on the role of the advisor for the club, the minutes show that Anderson stated that if the ASB Council voted to approve the charter, he would consult the District's attorneys and Kentridge would make a final decision on approving the charter. The Counsel voted eleven to six against approval of Truth's second charter.

On April 3, Truth filed a complaint in the United States District Court for the Western District of Washington, alleging that defendants had violated the Act, as well as the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. Truth sought injunctive and declaratory relief as well as nominal damages.

On April 9, Anderson sent Stewart a letter informing her of her right to resubmit Truth's application for ASB club recognition: "As was discussed at the ASB meeting on March 28th, by making minor changes to Article[s] I and III of the proposed Constitution for your club, you will address the points raised." Article I sets forth the name of the club and Article III contains the voting membership and officer restrictions. Anderson advised Stewart to "be prepared to resubmit by the April 25th ASB Meeting." Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the

required changes made or the charter shall be permanently rejected."

Stewart and Undis submitted the third charter on April 24. The third charter maintains the proposed name "Truth." However, it divides the membership into three categories: voting members, non-voting members, and attendees. Meetings are open to everyone. But the "privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." The charter application also lists a "true desire to . . . grow in a relationship with Jesus Christ" under the "Membership Criteria" heading. In order to be a voting member or officer, students are required to sign a "statement of faith." The statement of faith requires the person to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God." A member must also pledge that he or she believes "that salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Other than the ability to call oneself a "member," there is no difference between the rights of non-voting members and attendees.

The third charter was discussed at the April 25 ASB Council meeting. The ASB Council again objected to the name, selectivity provisions, and the presence of religion in school. The council voted nineteen to zero to deny approval of the charter, with one member undecided. The minutes give four

reasons why the charter was not accepted: 1) "Name," 2) "Pledge to vote," 3) "Segregating," 4) "Religious club in school."

On May 6, Tyler wrote to the Kent School District's counsel stating that it was his "understanding from the ASB Constitution that this rejection by the ASB is the final decision." The letter also provided that Tyler "was unable to locate any rights to appeal the decision of the ASB," but that if there were "a right to appeal the decision of the ASB," he asked that the letter "serve as a formal request for appeal."

Anderson advised Undis and Stewart in a May 12 letter "that pursuant to Kent School District Policy 2340, [they had] the ability to discuss this matter with Mr. Albrecht," and mentioned the possibility of discussions with the District superintendent or the ombudservices office. Although Tyler's May 6 letter would appear to have invoked these processes, no further action was taken by the District. Policy 2340 concerns "religious related activities or practices." The policy does not refer to ASB recognition, and the ASB Constitution does not refer to this policy as providing an avenue for an appeal of the District's decisions, which are otherwise "final."

Although Undis and Stewart have both graduated from Kentridge, they have indicated that another student, Lindsay Thomas, is prepared to assume leadership of the club if the charter is approved.

The Kent School District has three policies relevant to this appeal. First, Policy 3210 provides that "[t]he district will provide equal educational

opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status, previous arrest . . . , incarceration, or physical, sensory or mental disabilities." The district court held that inclusion of "creed" indicates that discrimination based upon religion is prohibited. That ruling has not been challenged on appeal.

Second, Policy 2153 provides for "noncurriculum-related, non ASB student groups," which groups the principal shall approve provided they meet several additional requirements. The policy does not accord ASB privileges to Policy 2153 groups. The District states that Truth "is free to operate as a private Policy 2153 group," but argues that Truth was properly denied ASB recognition.

Third, Policy 2340P regulates "religious related activities or practices," and provides guidelines for schools addressing religious holidays, symbols, ceremonies, topics, activities, and beliefs. This policy also provides that "[s]tudents, parents, and employees who are aggrieved by practices or activities conducted in the school or district may seek resolution of their concern first with the building principal, then with the district superintendent or designee, or use ombudservices, which is available through the Legal Services Department."

Washington State also has a relevant non-discrimination law, which the District relies on to

justify its denial of ASB recognition for Truth. Washington Revised Code § 49.60.215 (West 2006) provides that:

> It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, . . . or the refusing or withholding from any person the admission, patron-age, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person.

The District has argued that these non-discrimination policies require it to deny ASB recognition to Truth.

As of April 3, 2003, there were thirty ASB-recognized clubs at Kentridge. There is no evidence of any Policy 2153 groups at Kentridge. While the record does not contain the charters of all the clubs, it appears that many of them have selective membership criteria, restricting member-ship based on both beliefs and conduct. Indeed, each charter application contains a section for "Membership Criteria."

The Earth Corps, for example, requires members to show "interest and dedication toward environmental issues." Similarly, the Key Club requires that members be "interested in service, qualified scholastically, of good character, possessing leadership potential . . . [and] willing to perform at least fifty hours of . . . service." The Gay-Straight Alliance requires that students "must be willing to work towards the goals of the club" to be members. These goals include "bring[ing] GLBTQ [Gay, Lesbian, Bisexual, Transgendered, and Questioning] issues into the open, while working to decrease homophobia." Other goals include "changing stereotypes" and "fight[ing] heterosexism and other forms of oppression." The National Honor Society selects its members based on "outstanding scholarship, character, leadership, and service," and requires them to "behave in a courteous and respectful manner, refraining from language and actions that might bring discredit upon themselves." It also requires members to refrain from using or possessing alcohol or illegal substances. Participation in school sports requires maintaining a certain grade point average and attendance record, not using drugs or alcohol, and complying with the "sports code." Finally, a Men's Honor Club and a Girls Honor Club also operate at Kentridge as ASB-recognized groups. Each club has gender-exclusive membership.

The district court entered summary judgment on all of Truth's claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), with the exception of the Act claim. The court held that the requirements of municipal liability under 42 U.S.C. §

1983 were not satisfied, and therefore entered summary judgment in favor of the District. It also held that the actions against the individual defendants in their official capacities were functionally equivalent to suits directly against the municipality, and therefore Truth's claims against them failed.

The district court ruled on the merits of the Act and some of the First Amendment claims, addressing the latter as an alternate holding if its *Monell* ruling were to be reversed. It held that the restrictions on general membership in the third charter constituted a legitimate basis for denying the third charter and that these claims therefore failed.

The district court did not rule on the remaining claims based on its belief that "Plaintiffs' cursory Equal Protection Clause, Establishment Clause, and Free Exercise Clause arguments are all subsumed within their First Amendment argument." The district court also did not address the District's argument that granting ASB recognition to Truth would violate the Establishment Clause.

On appeal, both sides agree that only the third charter is before us. Truth makes this concession even though this action was filed before the third charter and its complaint only addresses the denial of its second charter.

This appeal requires us to review many determinations by the district court. As to each issue, we review de novo. We review a district court's summary judgment de novo. *See Buono v. Norton*,

371 F.3d 543, 545 (9th Cir. 2004). In deter-mining whether summary judgment was appropriate, we view the evidence in the light most favorable to Truth, the non-moving party. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). "We may affirm on any ground supported by the record." *Id.* We also review de novo the district court's *Monell* rulings, *see Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir. 2003), its "decision regarding the scope of a constitutional right," *see United States v. Napier*, 436 F.3d 1133, 1135-36 (9th Cir. 2006), and its interpretation of the Act, *see SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003).

II.

Before addressing the merits, we consider our jurisdiction. The District argues that Truth lacks standing under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), because Truth has failed to meet the "likelihood of recurrence" requirement. The District asserts that Truth "cannot say the ASB or the District will always deny another Club application or even the same application."

[1] In order to establish Article III standing,

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). Although the District has not made any arguments regarding these specific factors, we have an independent obligation to address whether we have subject-matter jurisdiction. *See Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

[2] With respect to injunctive relief, the Supreme Court has also required that a plaintiff show that "he is realistically threatened by a repetition of [the violation]." *Lyons*, 461 U.S. at 109. "The plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such recurrence is probable." *Jones v. City of Los Angeles*, 444 F.3d 1118, 1127 (9th Cir. 2006), *citing Honig v. Doe*, 484 U.S. 305, 318 & n.6 (1988). While we have extended this requirement to declaratory relief, *see Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006), it does not apply to monetary damages, *see Lyons*, 461 U.S. at 105. The District's standing argument therefore does not implicate Truth's standing to seek nominal damages.

The District asserts that the Establishment Clause, state law, and its own non-discrimination policies mandate that it deny ASB recognition to Truth. If the District believes that three independent

and binding legal authorities compel it to deny Truth's application, we do not see how the District might approve the same or a similar charter request in the future.

[3] The District's written non-discrimination policies also support Truth's standing arguments. We have held that plaintiffs "may demonstrate that an injury is likely to recur by showing that the defendant had . . . a written policy, and that the injury 'stems from' that policy. Where the harm alleged is directly traceable to a written policy there is an implicit likelihood of its repetition in the immediate future." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (internal quotations and alterations omitted). Here, the harm is traceable to the District's policies, which the District has argued compel it to deny ASB recognition to Truth.

Additionally, despite Tyler's request that the District treat his letter as a "formal request for appeal," the District took no action. This is evidence that another charter request is likely to meet the same fate as the previous three. Finally, the District has provided nothing beyond its own speculation that the outcome might be different if Truth submitted a fourth charter. The legal positions it has taken in this litigation strongly suggest that no similar applications will ever be approved.

[4] Under these circumstances, we conclude that Truth has established at least a genuine issue of material fact as to whether there is a reasonable expectation that the alleged injury will recur.

Therefore, Truth has standing to seek each of its requested forms of relief.

The District also suggests that this dispute is not ripe for review, and that we thus lack jurisdiction, because Truth did not bring the dispute to the Kent School District Board or Superintendent through Policy 2340P. The District is wrong. The Supreme Court has explicitly held that exhaustion is not required for claims brought under 42 U.S.C. § 1983. *See Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974). Exhaustion cannot be dispositive under a ripeness analysis; otherwise ripeness doctrine would impose a *de facto* exhaustion requirement, in violation of *Steffel*. Thus, the alleged failure to exhaust administrative remedies may be at most only a factor in the ripeness analysis.

[5] Nevertheless, it appears that Truth did exhaust the formal appeal system. Tyler's May 6 letter to the District's counsel asked that the letter "serve as a formal request for appeal." The District has not provided any reason why this notification was not sufficient to trigger its appeals process, and no reason is apparent in the record. The District's failure to take any action as a result of this request does not indicate that Truth failed to bring the matter to the attention of the District. Under these circumstances, there is at least a genuine issue of material fact as to whether Truth exhausted the District's grievance procedures.

Nearly every other factor suggests that this case is ripe for decision. Under the Kentridge ASB Constitution, "[a]ny rejected charters must be

resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected." The ASB Constitution does not provide for any additional review, nor does it suggest that the ASB Council's decision lacked finality.

Furthermore, there is no doubt that the effects of the denial of Truth's charter have been felt in a concrete way by the appellants. Truth's members have experienced three denials of their applications, as well as protracted delays in obtain-ing any action from the ASB Council and District. The harm that Truth has complained of does not "rest[ ] upon contingent future events" or ones that "may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Instead, Truth complains of discrete events that have already occurred.

[6] Finally, "in evaluating ripeness, courts assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir. 2000) (internal quotation omitted). We conclude the hardship to Truth in denying adjudication outweighs the hardship to the District in deciding this appeal. Truth's application for ASB recognition languished for nearly sixteen months without any significant action being taken, and the ASB process appears to have stalled until Truth obtained counsel and threatened to sue. More than five years have passed since the submission of the first charter, and declining to decide this appeal now would present a significant hardship to appellants.

[7] By contrast, the hardship to the District is significantly less severe. The District has been aware of Truth's arguments for a long time and has had ample opportunity to take corrective action or change its policies, if it so desired. Its legal positions on appeal show that it does not believe any remedial action is appropriate and that it believes the denial of ASB recognition was proper. We therefore conclude that this case is ripe for decision.

III.

[8] We must also consider the district court's ruling that the requirements of *Monell* are not met. *Monell* permits section 1983 actions against municipalities, but requires plaintiffs to show that their injuries resulted from "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. *Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here. *See Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989). The District acknowledges the controlling effect of *Chaloux*, but argues that it should be overruled because it "rests on shaky grounds."

[9] It is well established in our circuit that while

> a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law, we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision

> undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.

Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (internal citation and quotations omitted). The District argues that two Supreme Court cases, *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County*, 520 U.S. 781 (1997), show that the "Supreme Court has re-emphasized the importance and vitality of the doctrine that requires a municipal policy as a precondition to a lawsuit under § 1983." Neither of these cases addresses whether *Monell* applies to actions only seeking prospective relief. We have no authority to overrule *Chaloux*. *Chaloux* applies, and the district court's *Monell* ruling is reversed.

IV.

Relying on its non-discrimination policies, the District points to three aspects of Truth's third charter that justify its decision to deny the club ASB recognition: 1) the general membership restrictions, 2) the leadership and voting membership restrictions, and 3) the name "Truth." We address the first of these, holding that Truth's general membership restrictions violate the District's non-discrimination policies and are not protected by either the Act or the First Amendment.

A.

[10] States have the constitutional authority to enact legislation prohibiting invidious discrimina-

tion. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624-26 (1984) (reviewing the history of state anti-discrimination laws and observing that a "State enjoys broad authority to create rights of public access on behalf of its citizens"). Truth asserts that it does not discriminate based on religion in violation of the plain language of the District's policies, but rather imposes a code of conduct not unlike those of other approved ASB clubs. Even assuming that non-Christians would be able to comply with Truth's view of "Christian character, Christian speech, Christian behavior and Christian conduct," we hold that the requirement that members possess a "true desire to...grow in a relationship with Jesus Christ" inherently excludes non-Christians.

[11] Having determined that the third charter violates the District's non-discrimination policies, we are led to hold that the District's denial of ASB recognition on this account is consistent with the Act. The Act requires federally-funded schools that have created a limited open forum to grant religious clubs benefits and privileges afforded to all other noncurriculum clubs. *See Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 235-36 (1990); *Prince*, 303 F.3d at 1081 ("[T]he term 'equal access' means what the Supreme Court said in *Widmar* [*v. Vincent*, 454 U.S. 263, 267-71 (1981)]: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities . . . ."). *Prince* held that the rights protected under the Act include equal access to the funding and public communication techniques associated with recognition as an ASB group. 303 F.3d at 1084-90.

Truth now requests an exemption from school policies regulating Truth's conduct, arguing that its rights under the Act would be violated were it not granted such an exemption. In interpreting the Act, we begin with its plain language. "Where the intent of Congress has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Id.* at 1079 (internal quotations and citation omitted). Where there may be uncertainty, however, we rely on the Supreme Court's direction that the Act is to be "interpreted broadly," *Mergens*, 496 U.S. at 239, as well as cases deciding analogous issues under the First Amendment. *Cf. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 855-56 (2d Cir. 1996) (adopting similar approach).

[12] By its plain terms, the Act prevents only denials of access or fair opportunity or discrimination "on the basis of the religious, political, philosophical, or other content of the speech at [a club's] meetings." 20 U.S.C. § 4071(a). Therefore, once it is established that the secondary school receives federal funds and has created a limited open forum, the club must demonstrate two additional elements to prevail: 1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the "content of the speech" at its meetings.

[13] The District has denied Truth ASB status not because of the religious "content of the speech," but rather because of its discriminatory membership criteria. The Act does not define "content of the speech," but that phrase has a particular meaning in First Amendment jurisprudence. We have held that

"whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (quotations and citation omitted). Similarly, a "restriction on expressive activity is content-neutral if it is...based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *Id.* (quotations and citation omitted).

The Act, through which Congress extended the reasoning of the Supreme Court's 1981 decision in *Widmar v. Vincent* to secondary schools, *see Mergens*, 496 U.S. at 235, tracks *Widmar*'s emphasis on discrimination based on the content of the plaintiff's speech. *Widmar* struck down a state university's regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." 454 U.S. at 265. *Widmar* thus precluded a university's "discriminatory exclusion from a public forum based on the religious content of a group's intended speech," 454 U.S. at 269-70, but not its "right to exclude . . . First Amendment activities that violate reasonable campus rules," *id.* at 277. Likewise, the Act prevents a school's unreasonable limitation on the conduct of a club to the extent the limitation is justified with reference to the expressive content of the regulated conduct. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech" (internal quotations and citation omitted)).

[14] Congress could have written the Act to protect religious clubs against *any* burden on their activities, but did not. For example, when Congress passed the Religious Land Use and Institutionalized Persons Act, it not only prohibited discrimination against religious groups as such but also limited governments' abilities to impose even neutral, nondiscriminatory policies against them:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Thus, Congress knows how to draft a statute placing otherwise content-neutral laws of general applicability that incidentally burden a First Amendment activity under the same judicial scrutiny as laws specifically targeting the religious content of a group's expression. *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 985-86 (9th Cir. 2006). That is not the case here. The Act clearly allows exclusions that are not "content"-based.

[15] The Act's legislative history strengthens our conclusion that it prohibits only content-based restrictions on religious groups. The legislative history focuses on Congress's intent to end school districts' previous practice of treating religious groups inequitably and forbidding them from meeting on campus. *See* S. Rep. 98-357, at 6, 1984 U.S.C.C.A.N. 2348, 2352 (1984) ("Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity."); *id.* at 15, 1984 U.S.C.C.A.N. at 2361 ("[S]chool authorities across the country are banishing religious clubs from campus or placing such onerous restrictions on them that meetings become almost impossible."). The Senate Report recognized the possibility that religious groups like Truth might claim that content-neutral policies regulating club membership violate the Act, and disclaimed any such intent:

> At the same time, the guarantee of equal access does not require special treatment for religious groups. Religious groups are accorded only the same rights and privileges as are granted to other student groups. In practice, however, this means that not all student groups would receive exactly the same privileges. There could be many neutral and impartial time, place, and manner restrictions placed on the use of school facilities which might produce situations in which some voluntary groups would not receive precisely the same access received by others. . . . The access determination could not be made,

> however, on the basis that the nature of the activity was religious.

Id. at 39, 1984 U.S.C.C.A.N. at 2385. The District's non-discrimination policies are not time, place or manner restrictions. But like such restrictions, the policies are content-neutral. This strongly suggests that Congress did not intend the Act to apply to non-discrimination policies.

[16] The parties do not dispute that the Kent School District receives federal funding, or that Kentridge has created a limited open forum for extracurricular student groups. The District contests, however, whether the Act's guarantee of equal access, fair opportunity, and non-discrimination protects Truth's freedom to exclude those who do not share Christian values from its general membership. On their face, the District's non-discrimination policies do not preclude or discriminate against religious speech. Indeed, there are two other Bible clubs at Kentridge that have received ASB recognition and do not share Truth's general membership restrictions. Truth also has not shown that the District justifies its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content-neutral. Therefore, to the extent they proscribe Truth's discriminatory general membership restrictions, the policies do not implicate any rights that Truth might enjoy under the Act.

Our reasoning is in some tension with that of the Second Circuit, which has focused on the term

"speech" in the Act rather than the content-neutrality (or lack thereof) of school policies. *See Hsu,* 85 F.3d at 856 (rejecting argument that Act was not implicated because "the School did not base its qualified recognition of the Club on what would be said at the Club meetings, but on what could be characterized as the Club's 'act' of excluding non-Christians from leadership"); *id.* at 859 (Act triggered "when an after-school religious club excludes people of other religions from conducting its meetings . . . to protect the expressive content of the meetings"). However, the argument that the Act does not extend to content-neutral regulations, which we have concluded is correct, was not squarely addressed in *Hsu.*

Truth has also made a cursory argument that the District violated the Act by allowing other groups to impose codes of conduct and other selective membership criteria, while denying it an equal opportunity to do the same. With respect to most of these other groups, we can reject Truth's premise because the groups do not discriminate on a basis specifically enumerated by the non-discrimination policies.

It is true that the Men's and Girls Honor Clubs are more difficult to distinguish, as they employ gender-restrictive membership criteria. However, the record is devoid of any information on the approval processes for these clubs and the rationale given for the apparent exemption from the Kent School District's non-discrimination policies. Nor has Truth alleged that the District has a policy of granting exemptions, and that this policy was unequally

applied to Truth. Under these circumstances, we conclude that Truth has failed to meet its burden of showing that the District violated the Act.

[17] Because the Act did not bar the District from denying ASB recognition to Truth on account of the general membership restrictions in its third charter, we affirm the district court's summary judgment on Truth's claim under the Act.

B.

We next address whether, and if so how, the First Amendment may apply where a school denies ASB recognition to a student club based on its membership criteria. *Roberts* suggests that a First Amendment claim arising from such a denial may fall into one of two categories. *See* 468 U.S.at 622-23. Although these categories of claims may implicate different levels of review, we need not decide which test applies as Truth has failed to show that the denial of ASB recognition based on its general membership restrictions burdens a First Amendment interest, which is a threshold inquiry under either test.

Healy v. James typifies the first category of First Amendment claim. 408 U.S. 169 (1972). There, the president of a state college denied official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society (SDS), an organization that, in the Supreme Court's view, had been a "catalytic force" behind "civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson." *Id.* at

170-71. The students sued the college president, among others, asserting that the denial of official recognition violated the First Amendment. *Id.* at 177. The Court held that the Second Circuit erred by discounting the existence of a cognizable First Amendment associational interest, *id.* at 181-82, 184, but also stated that if the district court on remand found that there was evidence to support the conclusion that a local SDS chapter posed "a substantial threat of material disruption," then the president's decision to deny official recognition should be affirmed, *id.* at 189.

"Associational activities," held the Court, "need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* The Court did not condemn incidental infringements on the students' associational rights, so long as the school's reason for denying official recognition was "directed at the organization's activities, rather than its philosophy." *Id.* at 188.

Healy observed that "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." *Id.* at 192. This distinction permits schools to regulate student conduct, even if it incidentally affects student expression:

> Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may

> impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Id. at 192-93. The Court "conclude[d] that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rule with which it disagrees." *Id.* at 193-94.

To determine whether a campus rule that incidentally burdens expressive rights is permissible under the First Amendment, *Healy* calls for applying the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). *Healy*, 408 U.S. at 189 n.20. In *O'Brien*, the government prosecuted an individual for burning his draft card, which the Court assumed to be expressive conduct. 391 U.S. at 376. The Court held that government regulation of expressive conduct is permissible

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the

> governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

[18] Accordingly, for the *O'Brien* test to apply, the government regulation must incidentally affect expressive conduct. Truth has not established that its policy of excluding persons who do not share Christian values from its general membership has any expressive content, let alone that this policy communicates a message consistent with the views of the club's organizers. Truth has thus failed to show the required incidental infringement of a First Amendment interest.

By contrast, a claim falling in the second *Roberts* category is one where a regulation imposes a Hobson's Choice on the organization: include unwanted members or disband. Such "forced-inclusion" claims have come in two varieties. First, an organization may challenge a state law that forces it to accept leaders or voting members who do not hold views consistent with the original members. *California Democratic Party v. Jones*, for instance, held that a state primary law violated the First Amendment because it forced "political parties to associate with — to have their nominees, and hence their positions, determined by — those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." 530 U.S. 567, 577 (2000). Similarly, *Democratic Party of*

the United States v. Wisconsin ex rel. La Follette overturned, on First Amendment grounds, a state law that effectively required the National Democratic Party, in violation of the party's rules, to allow non-party members to participate in the selection of the party's presidential nominee. 450 U.S. 107, 125-26 (1981) (*La Follette*).

Second, an organization may challenge a regulation that forces it to accept as members individuals whose very membership in the organization would force it to communicate a message inconsistent with the views of the organization's original members. Leading this line of cases is *Roberts*, where the Court upheld against a First Amendment challenge a state law requiring the Jaycees to admit women as voting members. 468 U.S. at 628-29. The Court did so in part because the "Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities." *Id.* at 627. In the Court's view, any claim that their admission "will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best." *Id.*

By contrast, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* held that a state law violated the First Amendment because it required parade organizers to allow a gay, lesbian, and bisexual contingent to march in the parade. 515 U.S. 557, 559 (1995). The Court emphasized that the contingent's mere presence behind the organizer's banner conflicted with the organizer's "particular point of view." *Id.* at 575.

The Court reached a similar conclusion in *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000). There, the Court held that a state non-discrimination law requiring the Boy Scouts to admit a gay-rights activist violated the First Amendment because it "force[d] the organization to send a message . . . that [it] accepts homosexual conduct as a legitimate form of behavior." *Id.* Significantly, this message conflicted with the "sincerely" held views of the organization. *Id.* Most recently, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* upheld the Solomon Amendment against a *Dale* challenge on the ground that the military recruiters required to be admitted to law schools "come onto campus for the limited purpose of trying to hire students — not to become members of the school's expressive association." 126 S.Ct. 1297, 1312 (2006).

In both of these forced-inclusion scenarios, the Court has applied strict scrutiny, asking whether the organization's freedom of expressive association "could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (internal quotations and citation omitted); *see also Jones*, 530 U.S. at 582; *Roberts*, 468 U.S. at 623-26; *La Follette*, 450 U.S. at 125-26.

[19] The First Amendment interest implicated by the first kind of forced-inclusion case is not present here. The general members do not control the club's

Bible study and prayer functions. They do not lead the club in its activities. They cannot vote.

Truth has also not shown that the First Amendment interest implicated by the second kind of forced-inclusion case is present here. This case is not like *Hurley* or *Dale*. In *Hurley*, the gay, lesbian, and bisexual contingent wanted to be an equal participant in the organization's parade. In *Dale*, the gay-rights activist wanted to be a leader of the organization. Here, by contrast, those who merely seek general membership status do not seek to participate on equal footing with Truth's voting members or leaders. The concern that people outside the club will construe the non-Christian conduct of general members as conduct endorsed by Truth has therefore not been proven here to the same extent that it was demonstrated in *Hurley* and *Dale*. On this record, outside observers would not receive, from the admission of individuals that Truth wishes to exclude from its general membership, any message that conflicts with the club's views. Moreover, Truth states in its brief that the admission of non-Christians as general members would be unproblematic. While this statement does not resolve the issue before us — namely, whether the admission of individuals who do not meet Truth's general membership criteria (a category distinct from non-Christians) would convey a message in conflict with the club's views — it does further suggest that general membership status is not a significant measure of the club's expressive purposes.

In *Christian Legal Society v. Walker*, 453 F.3d 853, 857, 861-84 (7th Cir. 2006), the Seventh Circuit applied the forced-inclusion cases to a similar set of facts. Truth, however, has not shown the infringement of a cognizable First Amendment interest with respect to the District's denial of ASB recognition on account of the general membership restrictions. Therefore, we will not express any opinion here on whether the Seventh Circuit employed the appropriate legal framework.

[20] We thus affirm the district court's summary judgment on the First Amendment claim. We need not address whether the District violated the Act or the First Amendment by denying ASB recognition due to the voting membership and leadership restrictions. Nor do we address whether the Establishment Clause requires the District to deny Truth ASB recognition.

V.

We next discuss Truth's First Amendment Free Exercise Clause claim. Truth contends that the strict scrutiny standard of *Sherbert v. Verner*, 374 U.S. 398 (1963), applies, while the District appears to argue for application of the rational basis test of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

Ordinarily, "the rational basis test applies in ascertaining whether a neutral law of general applicability violates the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." *San Jose*

Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1031 (9th Cir. 2004) (alterations and internal quotations omitted). "In *Smith*, [however,] the Supreme Court stated that free exercise claims implicating other constitutional protections, such as free speech, could qualify for [*Sherbert*] strict scrutiny review even if the challenged law is neutral and generally applicable." *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). In order to make out such a hybrid claim, "a 'free exercise plaintiff must make out a colorable claim that a companion right has been violated.'" *Id.*, *quoting Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999).

[21] We have held that Truth's First Amendment argument with respect to the general membership restrictions is not colorable. Accordingly, rational basis review applies to the group's Free Exercise claim. Although the district court did not distinctly address this claim, we need not remand because it is clear that the claim is meritless. *See In re Pintlar Corp.*, 133 F.3d 1141, 1145 (9th Cir. 1998) ("Remand is not necessary where the issue has been fully briefed on appeal, the record is clear and remand would impose needless additional expense and delay" (internal quotation marks omitted)). The District had a rational basis for drafting and implementing its non-discrimination policies, namely its legitimate aim of preventing students from being subjected to unequal treatment on account of their religion. *See Roberts*, 468 U.S. at 623 (referring to the state's "compelling interest in eradicating discrimination").

[22] Truth's Equal Protection and Establishment Clause claims are given only brief treatment by Truth and rely on the same premise: that the unequal treatment of Truth's charter application violates the applicable clause of the Constitution. We need not reach the merits of this argument because we can reject the premise. Truth was not accorded unequal treatment, because the denial of its third charter was justified under the First Amendment and the Act based upon its general membership restrictions. This denial represented a neutral application of the Kent School District's non-discrimination policies and therefore did not constitute unequal treatment.

The District has also argued that the ASB has free speech rights that would be violated if it were compelled to recognize Truth as an ASB organization. The ASB is not a party to this appeal and there is no indication that the District has authorization from the ASB to assert any such First Amendment claims. We conclude that the District lacks prudential standing to assert the ASB's free speech rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (internal quotations omitted)).

VI.

[23] It is prudent to address only those issues necessary for our decision on the third charter application. We hold only that the District did not

violate the Act or Truth's First Amendment rights by requiring Truth to remove its general membership provision. Because the denial of Truth's third charter was permissible on this basis, we need go no further to affirm the summary judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRUTH, et al., Plaintiffs, v. KENT SCHOOL DISTRICT, et al., Defendants.	No. C03-785P ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross-motions for summary judgment. (Dkt. Nos. 71, 74). Having reviewed the parties' pleadings and supporting materials and having heard oral argument by both parties, the Court GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment. Defendants are not liable under § 1983 for any alleged constitutional violations. Even if they were, Defendants' actions have not violated Plaintiffs' constitutional rights. Likewise, Defendants' actions have not violated the Equal Access Act.

BACKGROUND

This Court outlined in detail the facts in this case in its December 31, 2003 Order Denying Plaintiffs' Motion for a Preliminary Injunction, (Dkt. No. 58). In the statement of facts section of their current Motion for Summary Judgment, Plaintiffs quote the Preliminary Injunction Order's recitation of the facts. Because those facts remain unchanged, this Order's factual recitation is largely the same as in the Preliminary Injunction Order. Both parties point to additional relevant and undisputed facts, which are incorporated below.

This case involves a Christian student group's efforts to form a Bible club named "Truth" at Kentridge High School ("the School") and gain recognition as a legitimate non-curriculum student group, approved and funded by the High School's Associated Student Body ("ASB"). The ASB consists of selected students who act as representatives of the student body. (Stewart Decl.,[6] Ex. B). ASB clubs can meet during non-instructional time on campus and can raise money and receive ASB funds. Additionally, an ASB club is entitled to advertise its activities, be recognized in the school yearbook, and announce club activities over the public address system.

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[6] In their Motion for Summary Judgment, Plaintiffs incorporate and cite to the declarations of Sarice Undis, Julianne Stewart, Robert Tyler that were filed in support of Plaintiffs' Response to Defendants' (First) Motion for Summary Judgment, which was filed July 17, 2003. Therefore, this Order cites to these same declarations.

At the time this case was filed, Plaintiff Sarice Undis was a senior at Kentridge and Plaintiff Julianne Stewart was a junior there.[7] Both were involved in forming the Truth Bible Club ("the Bible Club" or "the Club"). In September, 2001, Ms. Stewart submitted an application, known as a "Charter," to the ASB for approval as an ASB club. (Tierney Decl.,[8] Ex. 8 ("the First Application")). The Charter application indicated that the Club's purpose was "to have Bible study to encourage and help become better people, with good morals." (Id.) The Club proposed to do a "quote of the week for announcement" and "once a month decorate [the] school with a theme" in addition to prayer. (Id.) The Club indicated that it would be open to everyone. (Id.) At an ASB meeting held in 2001 sometime after the application was submitted, numerous students objected to the Club. The ASB indicated that it intended to discuss the matter with Assistant Principal Eric Anderson. Assistant Principal Anderson then told Ms. Undis that he and Principal Michael Albrecht were going to speak with the school's attorney regarding the legality of the Bible Club. (Undis Decl., ¶ 5).

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[7] Both of these Plaintiffs have since graduated. Ms. Stewart indicates that Lindsay Thomas, a current student, has replaced Ms. Stewart as the unofficial leader of the Club. (Second Stewart Decl., ¶ 3).

[8] In the interest of clarity, "Tierney Decl." refers to the declaration of Michael Tierney, filed with Defendants' currently pending Motion for Summary Judgment, as opposed to the Tierney declaration, which was filed with Defendants' response to Plaintiffs' Motion for Summary Judgment.

According to Ms. Undis, between October, 2001 and June, 2002, she requested on at least ten occasions that Assistant Principal Anderson make a decision on the Club's application. (Id.) In the Spring of 2002, all school clubs were ordered to resubmit their Charters. (Id., ¶ 6). Ms. Undis states that "[i]t was common knowledge among the student club officials, due to a school newspaper article and various conversations, that the School District was discontent [sic] with the application by the Bible Club and the School District sought to have the present club charters appear more like 'curriculum related' clubs." (Id.) The record does not indicate that any change in the nature of the approved ASB clubs came of this effort. Ms Undis continued to request a decision on the Bible Club from September until December, 2002. (Id., ¶ 7).

On January 7, 2003, Robert Tyler, an attorney for the Plaintiffs, faxed a letter to Principal Albrecht, stating that the School was legally compelled to grant official recognition to the Club and demanding the School do so immediately. (Tyler Decl., Ex. J). On January 30, Mr. Tyler faxed a second letter to the School, this time directed to Michael Harrington, in-house counsel for the Kent School District ("the District"), asking for the forms necessary to file an application to gain ASB club status. The letter stated that the Plaintiffs would file a complaint in federal court if the Club were not approved by February 4. (Id., Ex. K).

Ms. Stewart submitted a new Charter application on February 2, 2003. (Tierney Decl., Ex.

9 ("the Second Application")). This application differed from the First Application in two relevant respects. First, the Second Application did not contain the same quote of the week or monthly decoration proposals. It indicated that its intended function was to "provide a biblically-based club for those students interested in growing in their relationship with Jesus Christ." Second, it stated that "only those professing a belief in the Bible and in Jesus Christ may vote." (Id.) The Club's constitution, which was submitted with the Charter application, reiterated the "belief" requirement for voting members. (Id., Ex. 10, Art. III).

On February 25, Mr. Tyler faxed a third letter to Mr. Harrington stating that neither he nor Plaintiffs had received word whether the Club was approved or not, and that if they did not hear by February 26, they would assume the application was denied. (Tyler Decl., Ex. L).

On March 27, 2003, Assistant Principal Anderson held an ASB meeting in which the Club's Second Application was discussed. (Tierney Decl., Ex. 20 (ASB meeting minutes)). Defendants maintain that the students on the ASB, not the School administration, raised concerns about the Club's name and membership requirements. Another meeting was held on April 1 in which the ASB denied the Club ASB status. (Id., Ex. 21 (ASB meeting minutes)). Following that meeting, Ms. Stewart claims that Assistant Principal Anderson informed her that the Club could amend the Charter application to address the ASB's concerns and resubmit its application. (Stewart Decl., ¶ 10).

However, there are no written documents in the record supporting this assertion.

On April 3, Plaintiffs filed a law suit against the District, Principal Albrecht, Assistant Principal Anderson, and Barbara Grohe, Superintendent of the District. Plaintiffs alleged violations of the Equal Access Act, the Free Speech Clause of the First Amendment, the Free Exercise Clause of the First Amendment, the Establishment Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. They alleged jurisdiction under 42 U.S.C. § 1983.

On April 9, 2003, Assistant Principal Anderson wrote a letter to Ms. Stewart indicating that she could resubmit her ASB application. The letter stated that "[a]s we discussed at the ASB meeting on March 28, by making minor changes to Article I [identifying the Club's name] and III [setting out the membership criteria] of the proposed constitution for your club, you will address the points raised." (Tierney Decl., Ex. 23).

On April 24, 2003, Ms. Stewart resubmitted an amended Charter application and amended constitution (Id., Exs. 11-12 ("the Third Application")). This version of the application differed from the Second Application in several relevant respects. First, in addition to its previously listed intended function, its purpose would be to "associate with other believers in Christian fellowship." Second, its general members were to have "a true desire to study the Bible and grow in a relationship with Jesus Christ." (Id., Ex. 11). The

accompanying amended constitution stated that "the privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible." (Id., Ex. 12 ("the general membership policy")). Additionally, the application stated that "[o]n1y those willing to sign the statement of faith may be voting members." (Id., Ex. 11). The statement of faith requires the signor to state that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," and that "salvation is an undeserved gift from God." (Id., Ex. 12). The constitution stated that "only persons who honestly sign the Statement of Faith ... are entitled to vote." (Id., Art. III ("the voting membership policy")). Lastly, it required that any student holding office "must honestly sign the statement of faith and believe in and be committed to biblical principles." (Id.)

In an ASB meeting on April 25, the ASB denied the Third Application. (Id., Ex. 22 (ASB meeting minutes))). The ASB members were opposed to the Club's faith-based membership requirement and the oath requirement for voting member status, and the Club's name "Truth" because they felt that it implied that differing religious beliefs were lies. (Anderson Decl. accompanying Defs' Resp. to Plfs' Mot. for Prelim. Inj., Exs. 1-3).

On May 12, 2003, Assistant Principal Anderson sent a letter to Ms. Undis and Ms. Stewart stating that he was aware that their request for ASB status was "declined" by the ASB Council. (Tierney

Decl., Ex. 24). He informed Plaintiffs that, pursuant to District Policy 2340, they had "the ability to discuss this matter" with the Principal. If they were not satisfied with this discussion, they were "welcome to make an appointment with the District Superintendent." Alternatively, they could contact that District Ombudservices' office. Assistant Principal Anderson stated that the "administration here at Kentridge and in the District retains the final oversight role in decisions about ASB clubs."

In this round of briefing, Plaintiffs now assert that the Club as described in the Third Application actually has three categories of students who may attend. The Court's Order denying Plaintiffs' Motion for Preliminary Injunction analyzed the Club as described in the Third Application as allowing two categories of students to participate: 1) general members, who must comply with the Christian conduct and speech standard; and 2) voting members, who had to sign the statement of faith. Plaintiffs now attempt to recharacterize the Club as allowing three categories of students to attend: 1) attendees, which includes students of all religions whether or not they comply with the Christian conduct and speech standard; 2) general members, who must comply the Christian conduct and speech standard; and 3) voting members, who must sign the statement of faith. (Second Stewart Decl., ¶¶ 5-7).

To support their general membership policy, Plaintiffs point to "codes of conduct" for membership that other ASB clubs at the School require. The National Honor Society conditions membership on "scholarship, character, leadership, and service" and

generally requires that members behave in a "courteous and respectful manner" and refrain from using illegal substances and alcohol. (Second Tyler Decl., Ex. G). The Girls Honor Society limits membership to girls with a certain GPA. (Id., Ex. H). The Boys Honor Society is intended to include "upright and virtuous students." (Id., Ex. J). The Gay-Straight Alliance is open to students who are "willing to work towards the goals of the club," which are listed as bringing "gay, lesbian, bisexual, transgendered, and questioning issue into the open, while working to decrease homophobia." (Id., Ex. K). The Key Club limits membership to those "interested in service, qualified scholastically, of good character, [and] possessing leadership potential." (Id., Ex. M). Lastly, the ASB conditions membership on following "the sports code." (Id., Ex. I). Participation in school sports requires that students comply with a code of conduct that includes maintaining a certain GPA, attendance record, and not using drugs or alcohol. (Id., Ex. A (Floyd Dep.) at 21). Additionally, the "sports code," as set out in the Athletic Handbook, requires that students "conduct themselves in a manner that will inspire pride and approval." (Id., Ex. E).

Plaintiffs rely heavily on a passage from the deposition of the District Superintendent, Barbara Grohe, for the proposition that the general code of conduct required of students relies on religious principles, which is no different from the Club's religious code of conduct requirement for general members. In her deposition, she was asked about her understanding of the meaning of "immoral conduct." (Id., Ex. D (Grohe Dep.) at 68). Superintendent

Grohe responded that "there are some generally accepted parameters around sexual conduct or vulgar speech." She was then asked if "there are general principles upon which your understanding of immoral conduct would come from, such as the Golden Rule, the Ten Commandments, the Torah, the Bible, a philosopher?" She answered "yes, all of those." (Id.) There is not enough of the deposition transcript included to know why she was being asked this since Plaintiffs have not pointed to any club that explicitly refers to a prohibition on "immoral conduct."

At oral argument on the preliminary injunction motion, Plaintiffs indicated that they seek to have the School grant the Club ASB status based on its Third Application and accompanying constitution. Nothing they have stated since indicates any change to their prior position. Indeed, much of their summary judgment briefing addresses the general membership policy, which is unique to the Third Application. Therefore, this Order is based on the Third Application.

ANALYSIS

Rule 56(c) provides, in part, that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (2003). Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City

of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). While "some alleged factual dispute between the parties will not defeat" a motion for summary judgment, "disputes over facts that might affect the outcome of the suit ... will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

I. Municipal Liability Under § 1983

As a threshold matter, Defendants argue that they are not liable under 42 U.S.C. § 1983 because no District policy caused the alleged deprivation of Plaintiffs' constitutional rights. Defendants raised this argument in an earlier Motion for Summary Judgment. The Court denied the motion on the grounds that there were genuine issues of fact as to 1) whether District officials of policymaking authority had actual knowledge of and were deliberately indifferent to the alleged constitutional violations occurring while Plaintiffs were seeking ASB status for the Club, and 2) whether District officials attempted to insulate themselves from liability for their unconstitutional policies by having the ASB Council deny the Club ASB status. (Dkt. No. 46). On both issues, the Court noted that Plaintiffs should be allowed to conduct discovery to support their deliberate indifference and/or evading liability theories of liability under § 1983. Defendants now argue that Plaintiffs have not revealed any facts that support either legal theory.

In general, municipalities and other bodies of local government are "persons" within the meaning

of 42 U.S.C. § 1983 that may be sued directly if they are alleged to have caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 (1978). While rejecting the use of the doctrine of respondeat superior, the Monell Court nevertheless concluded that local government could be held liable when an injury was inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy. . . ." Id. at 694.

There are three alternative means by which Defendants could be held liable under § 1983. First, a single decision by a policymaker can be considered "official policy" giving rise to municipal liability. Pembaur v. Cincinnati, 475 U. S. 469, 483-85 (1986) (plurality opinion). Thus, acts or decisions that were officially sanctioned or ordered by officials with final policymaking authority may trigger municipal liability. Id. State law determines whether a particular official has final policymaking authority. Id. In this case, the official with policymaking authority is the District Board of Directors ("the Board"). Under Washington law, an associated student body is formed with the approval of, regulated by, and operated subject to the control of the school district board of directors. RCW 28A.325.020, WAC § 392-138-010(1). See also RCW 28A.320.015(1) (a school district board of directors has the discretionary power to set policies regarding school programs, activities, and services). District Policies 1000 and 1001 identify the Board of Directors as the policymaker for the District.

(Tierney Decl., Exs. 1-2). The District's Board never decided one way or the other whether the Club should be granted ASB status. Therefore, there is no § 1983 municipal liability under this first standard.

As an alternative argument in support of this theory of liability, Plaintiffs argue the District is liable under § 1983 because officials within the District were aware of the Ninth Circuit's opinion in Prince v. Jacoby, 303 F.3d 1074, 1081 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003), and yet treated the Club in the same manner that was found unlawful in Prince. In that case, the school had denied a religious club ASB status and had instead granted it separate status as a club under a school district policy (Policy 5525) that did not provide the same benefits as ASB clubs received. The Ninth Circuit held that the Equal Access Act required that schools provide religious clubs with equal access, which meant allowing them to exist under the same terms and conditions as other clubs. Id. at 1081-83. According to Plaintiffs, Defendants have done the exact same thing as in Prince when they indicated that the School would allow the Club in its current proposed form to be a Policy 2153 club, which is similar to a Policy 5525 club that was at issue in Prince. Plaintiffs contend that the District had a duty to ensure that the Club here was given the same access to ASB status as other clubs and that by failing to do so, they are liable under § 1983.

Plaintiffs' argument is unpersuasive. The District may very well have been aware of Prince and its requirement that schools grant access to religious clubs on the same terms and conditions as

other clubs. (See McCaleb Aff., Ex. A at 17-18). The District complies with this requirement, as evidenced by the fact that there are two religious clubs within the District that have ASB status. (Tierney Decl., Ex. 18 ("Bible Club" at Meridian Junior High School) and Ex. 19 ("Truth Seekers" at Kentwood High School)). The Club in this case is different from those clubs and the club at issue in Prince because none of those clubs had the exclusive membership policies that are present in this case. Prince's holding did not address the legal issues presented by these membership policies. Therefore, the District's knowledge of Prince does not compel the District to grant the Club ASB status and does not mean that allowing them to exist as a Policy 2153 club is unlawful under Prince. A second means by which Defendants could be held liable under § 1983 is if Plaintiffs demonstrate that a decision by an official with policymaking authority reflected deliberate indifference to the risk that a violation of Plaintiffs' constitutional rights would follow the decision. Bd. Of County Commissioners of Bryan Co. v. Brown, 520 U.S. 397, 411 (1997). To prove deliberate indifference, a plaintiff has to show that an official with policymaking authority had actual knowledge of the alleged constitutional violations. Cf. Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274, 290-291 (1998) (requiring official's actual knowledge of sexual harassment for school's liability in Title IX claim in parallel to deliberate indifference standard for § 1983 claims). As stated above, the Board is the official with policymaking authority in this instance. Therefore, to establish municipal liability under this theory, Plaintiffs must show that the Board had actual knowledge of the alleged

constitutional violations that resulted from not granting the Club ASB status.

Plaintiffs have not introduced any evidence indicating that the Board knew of the Club and its attempt to attain ASB status between September, 2001 when the First Application was submitted, though December, 2002. While the Assistant Principal, Principal, and possibly the School's in-house counsel knew of the application and appeared to sit on it for over one year, there is no evidence that the Board knew of the Club and its pending application during this time.

In January, 2003, Plaintiffs' lawyer sent two letters, one to the Principal and the second to the School's in-house counsel, regarding Plaintiffs' grievances and the legal authority that he contended compelled the School to grant the Club ASB status. Again, however, there is no direct evidence that either the Principal or the School's in-house counsel informed the Board about these letters or forwarded a copy of either to them.

Plaintiffs argue that the Board knew of the Club's pending application and the potential constitutional issues involved before this lawsuit was filed on April 3, 2003. However, the evidence to support this proposition is inconclusive. Plaintiffs cite only two statements by two Board members from the various depositions of Board members that Plaintiffs took. One Board member states that the Board discussed the Club sometime during 2003; but he cannot remember when. (McCaleb Aff., Ex. C). Thus, it is inconclusive if this discussion took place

before or after Plaintiffs filed this lawsuit in April, 2003. The other deponent, the Board president, states that the Board discussed the Club sometime "within the past year." (Id., Ex. D). He was deposed in February, 2004. Thus, his recollection is that the Board discussed the Club sometime between February, 2003 and February, 2004. Again, this statement is inconclusive as to whether this discussion occurred before or after Plaintiffs filed this lawsuit. Given this inconclusive evidence, Plaintiffs have not provided sufficient evidence to support their deliberate indifference theory of liability.

A third alternative theory of municipal liability provides that a local government may be liable in § 1983 actions when the local government egregiously attempts to insulate itself from liability for its unconstitutional policies. City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (plurality opinion). Thus, in certain circumstances, liability may attach when a policymaker delegates his authority to another official. The Supreme Court in Praprotnik pointed to two instances in which delegation of authority would trigger § 1983 municipal liability: first, if a particular decision by a subordinate "was cast in the form of a policy statement and expressly approved by the supervising policymaker," and second, if "a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware." Id. at 130. In such instances, "the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official."

Id. However, the mere exercise of discretion by a lower level official or "[s]imply going along" with the lower-ranking official's decisions is not sufficient to trigger § 1983 liability. Id. at 126-27, 130.

Plaintiffs argue that the Defendants attempted to evade liability by channeling the decision to grant the Club ASB status to the ASB Council, even though the Defendants knew that this decision had constitutional implications and that the ASB Council could not properly address such issues. According to Plaintiffs, the Defendants used the ASB Council as the District's proxy to deny the application and thereby attempted to evade liability.

In contrast, Defendants argue that they allowed the ASB Council to make a recommendation to the Principal, which is part of the normal procedure in granting a club ASB status. (Tierney Decl., Ex. 11). When the ASB Council recommended denying their Second Application, Plaintiffs filed a lawsuit three days later, but at the same time submitted their revised Third Application a few weeks later. When the ASB Council recommended denying that application, Assistant Principal Anderson informed Plaintiffs in the May 12, 2004 letter that they could pursue additional avenues within the School administration to achieve their desired ASB status. Defendants maintain that, because Plaintiffs chose not to pursue these options, they never received a decision by anyone with final policymaking authority. Consequently, there is no official policy act on which to base § 1983 municipal liability.

Arguably, the Board has delegated its ASB club approval responsibilities to School administrators. One Board member stated that he has never approved ASB clubs in his nine years on the Board. (Second Tyler Decl., Ex. C). Thus, there is arguably a practice of delegating this responsibility to administrators within the School. Assistant Principal Anderson's May 12, 2004 letter bolsters this conclusion. It does not state that Plaintiffs would have to take their appeal directly to the Board. Rather, it states that Plaintiffs could discuss the matter with the Principal, the Superintendent and/or the District Ombudservices' office. It also stated that the "administration here at Kentridge and in the District retains the final oversight role in decisions about ASB clubs." These statements imply that School officials have the final authority to decide ASB-related issues.

Even if this is the case, however, Plaintiffs never sought a final decision from any of these officials. To overcome this problem, Plaintiffs point to Assistant Principal Anderson's deposition, in which he stated that he told the ASB Council that if they voted to recommend granting the Club ASB status, then the School's lawyers would determine if the Club would be allowed; but if they voted to recommend denying the Club ASB status, "it would end it." (Second Tyler Decl., Ex. C). However, even if Assistant Principal Anderson did convey to the ASB Council that a denial by them would "end it," Assistant Principal Anderson is not the final decision-making authority as to this issue. He states in his deposition that he came up with this formulation on his own; no one advised him of it.

(Id.) Therefore, the ASB Council's recommendation that the Club's application be denied cannot be said to constitute an official action by the District and does not trigger § 1983 municipal liability.

While School officials repeatedly referred the matter to the ASB Council and were generally tardy in responding to Plaintiffs' repeated requests, which might suggest that they were channeling the decision-making to the ASB and thereby attempting to insulate the District from liability, Plaintiffs continually changed the nature of the club they wanted approved, even after they filed this lawsuit. The shifting nature of Plaintiffs' proposals warranted repeatedly returning to the beginning of the process, namely the ASB Council's recommendation.

In sum, the District cannot be held liable under § 1983 for any alleged constitutional violations because none of the acts denying the Club ASB status can be attributed to the policymaking authority in the District overseeing the ASB. Because § 1983 "provides remedies for deprivations of rights established elsewhere," City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985), Plaintiffs' constitutional claims are rightly dismissed on this basis.[9] Tuttle noted that even if a plaintiff has been deprived of a constitutional right, the plaintiff must still establish that the deprivation was caused by a

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[9] Both parties noted at oral argument that Plaintiffs' Equal Access Act claim is not dependent on § 1983 liability and therefore must be addressed on its merits.

governmental body that is liable under the requirements established in Monell. Id. at 817.

Lastly, Plaintiffs maintain that even if the District is not liable under § 1983, the individual Defendants Superintendent Grohe, Principal Albrecht, and Assistant Principal Anderson are liable for their unlawful acts. (Plfs' Resp. at 1 n.2). However, Plaintiffs' Complaint states that each of these three Defendants are sued in their official capacities. (Plfs' Compl., ¶¶ 4.8, 4.13, 4.17). After the Supreme Court in Monell made clear that units within local governments can be liable under § 1983, the Court noted that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell, 436 U.S. at 690-91 & n.55. Thus, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." Kentucky v. Graham, 473 U.S. 159, 166 (1985). Therefore, Plaintiffs' argument on this issue is without merit.

II. The Equal Access Act

The Court's Order Denying Plaintiffs' Motion for a Preliminary Injunction analyzed the Plaintiffs' Equal Access Act claim and concluded that denying the Club ASB status based in part on its general membership policy did not violate this statute. The parties have not presented any facts that would change this analysis and conclusion. Likewise, Plaintiffs have not presented any legal arguments that persuade this Court that its previous analysis and conclusion were erroneous.

The Equal Access Act ("the EAA" or "the Act") guarantees public school students the right to form noncurriculum groups to engage in religious, political, or philosophical discourse. The Act states:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within the limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).

Thus, the Act applies only when the school receives federal funding and has created a limited open forum. A limited open forum is defined as allowing one or more noncurriculum-related student groups to meet on school premises during non-instructional time. § 4071(b). Neither party disputes that Kentridge High School receives federal funding and that it has created a limited public forum by granting numerous noncurricular student clubs ASB club status and benefits. (Stewart Decl., Ex. A (listing ASB clubs)). Therefore, the Act applies to Kentridge High School.

The Act prohibits Kentridge High School from denying equal access to or discriminating against students who wish to meet as a noncurricular student club on the basis of the content of the speech as such meetings. The Club was denied ASB status

due, in part, to its exclusionary general membership policy.[10] Plaintiffs have not shown that the Club's exclusionary general membership policy is protected speech under the EAA. Therefore, denying the Club ASB status because of its exclusionary general membership policy does not constitute a denial of equal access or discrimination based on the content of the Club's speech. As such, the School has not violated the EAA.

The Second Circuit addressed this issue in a case with similar facts. Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839 (2d Cir. 1996). In Hsu, students applied to their public high school to form a noncurricular religious club. General membership was to be open to all students.[11] Id. at 849. However, the club had proposed a requirement that all officers be "professed Christians though baptism or confirmation." Id. The school rejected the club on the grounds that the club's exclusionary officer policy

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[10] The Club was also denied ASB status due to the Club's exclusionary voting membership policy and objections to the Club's name "Truth." Because the Court bases this Order on the Club's exclusionary general membership policy, the Court need not reach the validity of either of these aspects of the Club or the denial of ASB status based on them under the EAA or constitutional principles.

[11] The club's original application indirectly required that all members be Christians by stating that the club's purpose was to provide time "when Christians gather to praise God." 85 F.3d at 849. The school denied official recognition because of this requirement, among other reasons. In response, the students who initiated the club changed the reference from "Christians" to the more inclusive "people." Id. at 849-50.

violated the school's nondiscrimination policy. Id. at 850.

The school argued that it had not violated the EAA because it did not deny the club official recognition on the basis of the content of the club's religious speech, but rather on the basis of its exclusionary officer policy. The Second Circuit rejected that argument. The court held that the club's exclusionary officer policy as applied to the limited number of officers who led the group in prayer and spiritual songs was protected "speech" under the EAA. It based this conclusion on Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, in which the Supreme Court held that the organizers of an Irish parade in Boston could exclude a gay, lesbian, and bisexual group from marching in the parade with a banner expressing their pride in their Irish heritage as openly gay, lesbian, and bisexual people. 515 U.S. 557 (1995). Hurley observed that the message a group imparts can depend on the group's ability to exclude those who might broadcast a contradictory message. Therefore, the ability to exclude such people is protected under the First Amendment's freedom of expressive association. Id. at 574. In Hsu, the religious club's constitution indicated that certain officers would be required to lead and perform the club's religious speech in prayer and song. Therefore, the club's exclusionary officer policy was statutorily protected "speech" because the policy was a way to assure that only a certain type of religious speech would occur at the meetings. The court held that it was acceptable to require that such officers be "professed" Christians only to the extent that there was an

"integral connection between the exclusionary leadership policy and the religious speech at their meetings." Hsu, 85 F.3d at 857. By concluding that the exclusionary officer policy applied to these limited officer positions was statutorily protected "speech," the school's denial of official recognition was based on the content of the speech. As such, the school had violated the EAA.

Using the same analysis, the court found that there was no similar reason to justify the club's requirement that officers whose duties did not involve leading the club in prayer or song be "professed" Christians. Notably, the court concluded that such a requirement would be akin to imposing a religious test for membership or attendance, which the court concluded would be "plainly insupportable." Id. at 857-58. "It is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the [c]lub's speech." Id. at 858 n.17. Therefore, the club's exclusionary officer policy for those positions was not statutorily protected speech. As such, the school did not violate the EAA by conditioning approval of the club on eliminating the exclusionary policy for those secondary officer positions. This conclusion is consistent with Hurley. Hsu correctly read Hurley as allowing the exclusion of people who intended to broadcast a particular message that was contrary to the group's message. Id. at 856. Hurley did not address whether the parade organizers could exclude all gay, lesbian, and bisexual people as individual participants in the parade. Hurley, 515 U.S. at 572.

Here, the Club's general membership policy goes far beyond the officer policy upheld in a limited fashion in Hsu. There is no indication that the Club's general members will control the Club's speech; they have no direct control over the prayer and study that will occur at Club meetings, the election of the Club's officers who are responsible for prayer and study at the meetings, or the Club's constitution. Instead, the exclusionary general membership policy is the type of religious test for membership[12] that Hsu indicated would be "plainly insupportable." As such, the exclusionary general membership policy is not statutorily protected speech. Denying the Club ASB status based in part on this policy does not violate the EAA. Plaintiffs argue that it is nonetheless violates the First Amendment right of expressive association.

III. First Amendment Right of Expressive Association

Even if the Court's conclusion that Defendants cannot be held liable under § 1983 for alleged constitutional violations were deemed erroneous, Defendants have not violated Plaintiffs' First Amendment right of expressive association. While the Club has a First Amendment right to expressive association, which includes the right to exclude

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[12] Plaintiffs argue that the general membership policy is not a "religious belief' requirement, but rather a code of conduct based on religious beliefs as determined by the Club's voting members and leadership. As discussed more thoroughly below, the Court concludes that this is a distinction without a meaningful difference.

general members based on religion, the School can justifiably limit that right in order to further a legitimate and compelling interest in not allowing an ASB club to discriminate on the basis of religion. The Court's Order Denying Plaintiffs' Motion for a Preliminary Injunction analyzed the Plaintiffs' First Amendment right to expressive association and reached this conclusion. Plaintiffs have presented additional arguments on this issue in their Motion for Summary Judgment. Despite those arguments, however, the Court reaches the same conclusion that it reached previously.

Implicit in protected First Amendment activities is a corresponding right to associate with others in pursuit of religious and other ends. Roberts v. United States Jaycees, 468 U.S. 609,622 (1984). Forcing a group to accept members it does not wish to accept may impair the group's ability to express its unique views and to refrain from expressing views with which it disagrees.

Consequently, the freedom of association encompasses a freedom not to associate. Id. at 623. In the context of student clubs on college campuses, denying them official recognition without justification burdens the student club's associational rights. Healy v. James, 408 U.S. 169, 181 (1972).

Plaintiffs rely on Democratic Party v. Wisconsin, 450 U.S. 107 (1981), New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), and Jaycees to support their argument that they have a right of association which allows them to exclude students from voting membership and general membership on the basis of religion. In

Democratic Party, Wisconsin had an open primary, allowing anyone to vote for a Democratic nominee. The National Democratic Party challenged the law because it violated the Democratic Party's rules limiting voting in primaries to voters who publically declared affiliation with the Party. The Court acknowledged that the state had a legitimate compelling state interest in encouraging voter participation. 450 U.S. at 121. However, it held that the state could not then compel the Party to seat the delegation elected in a manner contrary to the Party's exclusionary voting rule. The freedom to associate to advance political beliefs includes the right to limit membership in the association. The forced inclusion of people not affiliated with the political party "may seriously distort [the party's] collective decisions - thus impairing the party's essential functions – and . . . political parties may accordingly protect themselves from intrusion by those with adverse political principles." Id. at 122.

In New York State Club Ass'n, plaintiffs brought a facial challenge to a state law prohibiting discrimination in public accommodations. The state law prevented an association from using race, sex, or creed (among others) to exclude membership, but did not prevent groups from employing "legitimate criteria for determining membership." 487 U.S. at 13. The Court found the law passed constitutional muster. At the same time, the Court contemplated that an association might be able to show that "it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for

example, or the same religion." Id. In light of these holdings, it appears that the Club may have a First Amendment right in expressive association to exclude general members based on religion.

A. Limits on the Right to Expressive Association

Nonetheless, it is well established that the right of association is not absolute. A compelling state interest unrelated to the suppression of ideas can justify limiting the right of association as long as the interest cannot be served through less restrictive means. Jaycees, 468 U.S. at 623. The Jaycees were an educational and charitable nonprofit that promoted the interests of young men. A state law required that the Jaycees accept women as voting members. While the Court recognized that the law intruded into the internal structure of the association by forcing it to accept members it did not desire to accept, the Court concluded that the intrusion was justified by the state's compelling interest in eradicating discrimination against women. Id.

In this case, there is a legitimate and compelling state interest in having public schools provide equal opportunity and treatment to all students to participate in school activities programs without regard to religion, race, or sex (among other things). The School District's nondiscrimination Policy 3210 is designed to further this compelling

state interest.[13] It states "[t]he district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, [or] sex. . . ." (Tierney Decl., Ex. 7). Providing equal opportunity and treatment includes providing all students with equal access to student clubs allowed to operate on campus. Therefore, Policy 3210 prohibits denying individual students access to student activities programs such as student clubs on the basis of religion. It is particularly important in the public school context to prevent race, religion, or sex-based exclusion or discrimination in the provision of school benefits and programs. Preventing discrimination against these uniquely protected classes addresses past discrimination that our country has struggled to overcome. A public school must not only prevent such discrimination, but has an affirmative obligation to provide access to all of the school's activities for all students regardless of their religion.

Plaintiffs present two arguments to support their contention that the Club does not exclude students from participation in the Club on the basis of religion. Neither are persuasive. First, under the Club's three-tier membership system, students of all or no religious beliefs may attend as "attendees." (Plfs' Mot. at 10-11). This relies on Plaintiffs' new

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[13] As Defendants' point out, this interest is derived from the broader state-wide interest in preventing discrimination in public accommodation based on religion, race, sex, national origin, or disability, as manifested in RCW 49.60 et seq.

assertion that there are three categories of students who may participate in the Club's activities. However, this assertion is not set forth anywhere in their Third Application materials. Their Third Application materials refer to only two categories of students as participants - general members and voting members. In Plaintiffs' pleadings and at oral argument, Plaintiffs pointed to language in their First and Second Applications to support their assertion that the Club has this three-tiered membership system. However, Plaintiffs cannot have it both ways; they cannot demand ASB status for the Club as proposed in their Third Application, which is materially different from their two previous applications, and at the same time rely on language in those two previous applications to support their demand.

Second, Plaintiffs argue that the general membership policy refers to a code of conduct, not religious beliefs. Plaintiffs made this general argument in their Motion for Reconsideration of the Preliminary Injunction Order. The Court rejected it, stating that a student interested in joining the Club as a general member would have to determine what constitutes Christian character, speech, and conduct, which necessarily requires delving into religious beliefs. Plaintiffs now claim that the Club's voting members and leadership would determine what this Christian code of conduct is, based on their religious beliefs. According to Plaintiffs, students of any religion may become general members as long as their conduct conforms to the code of conduct as established by the Club's voting members and leadership. (Plfs' Mot. 11-12). However, while the

voting members and leadership may determine what they believe constitutes Christian conduct and speech, other students wishing to join as general members may have different beliefs regarding Christian conduct and speech, conduct themselves accordingly, and maintain that they have complied with the Club's code of conduct. The distinction between the two codes of conduct necessarily requires delving into religious beliefs. Exclusion is based those who hold different religious beliefs. This points to the fatal flaw in Plaintiffs' argument that the Club is no different from the numerous other ASB clubs that condition membership on certain codes of conduct. None of those clubs' codes of conduct are explicitly based on religion (let alone one group's interpretation of one religion). Some clubs require that students have good character or act virtuously. Good character, virtuous behavior, or moral conduct does not demand or require interpretation of religious principles.[14] What is "Christian" conduct varies widely from sect to sect, from church to church, or even from individual to individual, and necessarily embroils one in discussions of religious dogma.

Despite Plaintiffs' arguments to the contrary, granting the Club ASB status with its exclusionary general membership policy would violate the School's non-discrimination policy because it would

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[14] The fact that the District Superintendent stated that, in her view, "immoral conduct" is based in part on principles outlined in various religious texts is not relevant to this analysis.

deny individual students the opportunity to participate in the Club based on their religion. Therefore, the School's compelling interest in preventing discrimination based on religion justifies intruding upon the Club's right to expressive association. As required by the Jaycees, the School's denial of ASB status is not aimed at the suppression of the Club's speech or ideas; it is aimed at preventing violation of the School's nondiscrimination policy.[15] Additionally, Policy 3210 is sufficiently narrowly tailored. For example, it would not justify the School's denial of a politically-oriented student club that restricted general membership based on political ideology. In that instance, the club's right to expressive association would not discriminate based on race, religion, sex, or national origin. As such, the club's exercise of its expressive association would not undermine the School's legitimate interest in enforcing its non-discrimination policy. Consequently, the School could not rely on Policy 3210 to limit the club's right to expressive association.

This conclusion is consistent with the Supreme Court's decision in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). Boy Scouts limited Jaycees by holding that a state could enforce its public accommodations statute at the expense of a group's right of association only when doing so would

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[15] It is worth noting that there are two religious clubs that have ASB status at other schools in the District. Neither of these clubs exclude members based on religious belief or conduct.

not materially interfere with the ideas that the organization seeks to express. Id. at 657-58. The Jaycees' message was unrelated to gender. Therefore, forcing the Jaycees to accept women did not materially interfere with the Jaycees' message. In contrast, the Court held that the Boy Scouts could exclude a homosexual as a scoutmaster because the presence of an openly gay scoutmaster would undermine or distort the Boy Scout's moral and religious "message" that it intended to inculcate in its members. Id. at 653. Therefore, the state could not force the Boy Scouts to accept gay scoutmasters under the state's public accommodations law. Id. at 658. The Court noted that this result was consistent with Hurley. Even still, the Court noted that expressive association could not be used as a shield against antidiscrimination laws by simply asserting that acceptance of a certain type of member would impair the group's message. Id.

Here, there is no indication that inclusion of students of differing religious faiths and differing versions of the Christian faith as general members will materially interfere with the Club's expression of its ideas. The general members do not control the Club's Bible study and prayer functions. They do not lead the Club in its spiritual activities, nor do they dictate or control the other members' religious beliefs. If the Club were forced to open general membership to all students, the Club could still expound upon its particular religious beliefs, including for example the idea that only certain beliefs, conduct, and speech are truly Christian.

Plaintiffs' argument to the contrary is not persuasive. Plaintiffs argue that excluding students who do not comply with the general membership religious requirement is necessary for the Club's purpose and effectiveness. (Plfs' Mot. at 8-10). Plaintiffs cite a particular passage in Jaycees, in which the Supreme Court observed that forcing the Jaycees to include women would not impede the group's ability to promote the interests of men and would not impose any restriction on the group's ability to exclude people of different ideologies or philosophies. (Plfs' Mot. at 9). Plaintiffs maintain that they are a private organization that has a right to limit its membership based on religious ideology because that religious ideology is integral to the Club's purpose.[16] First, even if the Club, viewed in isolation, is a private organization, the very ASB status it seeks is part of the provision of benefits that the public school provides to students. Washington law requires schools to control the operation of, and oversee, ASBs and their activities. See RCW 28A.325.020, WAC 392-138-013(1). Thus, the Club is not a purely private organization.

Moreover, Hsu recognized that the school context requires a unique balancing of interests. Hsu held that a religious club could exclude students from core leadership positions on the basis of religion because those leadership positions were

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[16] The Court notes that Plaintiffs' argument that they have a right to exclude general members based on ideology or beliefs contradicts their earlier argument that their general membership policy does not exclude on the basis of belief but only on the basis of conduct.

important to the club's expression of its religious ideas. But it also held that the club could not exclude students from non-core leadership positions. Here, the Club's general membership exclusion is even more restrictive and has no integral connection to the Club's expression of its religious ideas. As such, the School can rightfully prioritize the School's legitimate interest in providing all students access to all student clubs without regard to the students' religious beliefs over the Club's interest in excluding such students as general members.

Boy Scouts and Hurley are further distinguishable from this case on a number of grounds. First, they are limited by the fact that homosexuals are not a protected class under current law. Unlike in the Jaycees, there is no corresponding compelling state interest in preventing discrimination against gay and lesbian citizens. In this case, however, there is a compelling state interest in providing equal treatment to students of all religious faiths, as discussed above. Additionally, both Hurley and Boy Scouts confronted a situation where the forced inclusion did not apply to general participants or members but rather of those who would broadcast a message contrary to the group's intended message. In Hurley, the contrary message would have been broadcast outwardly to the public in the Boston parade by banners displayed during the parade. In Boy Scouts, the contrary message would have been broadcast inwardly to the rest of the Boy Scout members by a scoutmaster acting in a leadership position. Neither are like the situation here. General members of the Club are merely participants, not

leaders. Lastly, neither Boy Scouts nor Hurley occurred in the public school context.

Finally, Plaintiffs argue that the only way the School may justifiably prohibit the Club from excluding voting members based on religion is if such exclusion constitutes invidious discrimination. Plaintiffs cite Hsu as standing for the general rule that

> When a sectarian club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission.

Hsu, 85 F.3d at 872-73. Plaintiffs seem to ignore the part of Hsu that held that the school could justifiably prohibit the religious club from requiring that officers who had no control over the club's message or speech be professed Christians. The court noted that this would be akin to a general membership requirement, which it deemed "plainly insupportable." The court reached this conclusion without going through any invidious discrimination analysis.

Because the Court concludes that Defendants may justifiably limit Plaintiffs' right to expressive association by withholding ASB status to the Club based on its religious-based exclusionary general membership policy, the Court need not reach the

parties' arguments under Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), regarding whether granting the Club ASB status would cause material disruption to the School's educational mission. Likewise, because Plaintiffs' cursory Equal Protection Clause, Establishment Clause, and Free Exercise Clause arguments are all subsumed within their First Amendment argument, the Court's need not explicitly address these arguments. Lastly, in light of the Court's holding, the Court need not reach Defendants' Establishment Clause argument.

CONCLUSION

The Court GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment. Defendants are not liable under § 1983 for any alleged constitutional violations. Even if they were, Defendants' actions have not violated Plaintiffs' constitutional rights. Likewise, Defendants' actions have not violated the Equal Access Act.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: September 23, 2004

/s/ Marsha Pechman
Marsha J. Pechman
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRUTH, an unincorporated association; et al., Plaintiffs - Appellants, v. KENT SCHOOL DISTRICT; et al., Defendants - Appellees.	No. 04-35876 D.C. No. CV-03-00785-MJP Western District of Washington, Seattle ORDER

Before: WALLACE, WARDLAW, and FISHER, Circuit Judges.

Judge Wardlaw and Judge Fisher have voted to deny the Petition for Rehearing En Banc, and Judge Wallace so recommends.

The full court was advised of the Petition for Rehearing En Banc. A judge of the court requested a vote on whether to rehear the case en banc, but the request failed to receive a majority of the votes of the nonrecused active judges in favor of en banc rehearing.

Appellant's Petition for Rehearing En Banc is DENIED.

BEA, Circuit Judge, dissenting from the denial of rehearing en banc, joined by O'SCANNLAIN, Circuit Judge:

A Christian Bible study group named "Truth" sought official recognition by a high school. Such recognition would entitle the group to use school rooms to hold lectures and discussions regarding the Bible and its teachings. Any group so recognized could also apply to use school materials and supplies to spread its message, at reduced prices. The school refused official recognition to Truth because it viewed Truth's requirement that members comply "'in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible'" as being discrimination based on religion. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 639 (9th Cir. 2008). The government's ability to regulate membership in a discussion group is the ability to regulate the viewpoint of the group. This case merited en banc review because a state school district should not require a Christian Bible study group to allow into its group non-Christians and Christians alike, as a condition for providing its school facilities and support. Yet this is what the majority concurrence[17] now holds. It reached that result by confusing the school's viewpoint-neutral right to limit speech in a limited public forum with a necessarily viewpoint-affecting regulation of the right freely to associate to express one's views.

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[17] What I object to is contained in the panel's "concurrence" signed by Judges Fisher and Wardlaw. This is no standard concurrence, however, because two of the three members of the panel concur in it. Thus, it is the opinion of the panel on this issue and creates binding precedent. *See* G.O. 4.5 ("[T]he determination of each appeal . . . shall be evidenced by a written disposition concurred in by a majority of the panel assigned to act thereon.").

No one argues a school cannot limit *what* topics student groups can discuss on campus. It is quite another thing to dictate *who* must be allowed into membership, so to affect the group's expression of viewpoints on such topics.

Unfortunately, the majority concurrence does just that: it tells the Christian Bible study group that because its membership is open only to those who comply "'in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible,'" the School District can refuse to extend the benefits which go with its official recognition of the Club. *Truth*, 542 F.3d at 639. The majority concurrence does this by mistakenly applying the law relating to permissible restrictions in "limited public forums," rather than applying the required law of "expressive associations." Because the majority concurrence makes circuit law, and because it is contrary to Supreme Court rulings and creates a circuit split with the Seventh Circuit, this case merited en banc review; I must dissent from the denial of rehearing en banc.

Discussion

The majority concurrence seems to reason that if the school can reasonably regulate the topics to be discussed by a group or the groups who can discuss such topics, it can regulate the membership of such groups.

Yet regulation of such topics and groups can never be based on the *viewpoints* to be expressed. That much the majority concurrence admits.[18] That is, the school could decide to ban all groups that wish to speak on abortion, on the ground the subject is not within the description of the purpose of a limited public forum dedicated to discussion of campus activities. What it could not do is allow speech only to pro-life speakers, but not allow it to proponents of abortion on demand.

Government action that infringes on the right of expressive association is subject to strict scrutiny: The government must show that its restriction is "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (internal citation and quotation marks omitted). By contrast, government action that infringes on the right of free speech in a limited public forum such as a school, is subject to a lower level of scrutiny. The government can "reasonably" regulate topics so long as the restrictions are viewpoint neutral. It can also regulate the time, place and manner of speech.

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[18] The majority states: "As our opinion explains, when the state creates a *limited* public forum, like the ASB program at issue here, it may restrict access to that forum so long as the restrictions are 'viewpoint neutral and reasonable in light of the purpose served by the forum,' even if these rules have the effect of limiting a group's ability to engage in protected speech, such as the right to speak, publish on a particular topic or engage in expressive association." *Truth*, 542 F.3d at 651 (Fisher, J. and Wardlaw, J., concurring).

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995). By applying the limited public forum test to the Club's right to decide who its members will be, the majority concurrence has lessened the scrutiny placed on restrictions of the right of expressive association.

Henceforth, school groups in this circuit will not be able to exclude unwanted members from groups formed for expressive association, if the school authorities have some "reasonable" basis upon which to limit their ability to exclude members. Such denial of the groups' right of exclusion will neither have to be justified by any compelling interest of the school, nor narrowly tailored to restrictions needed only to advance that interest, contrary to Supreme Court precedent.

I. The majority concurrence's holding fails to follow binding Supreme Court precedent.

The essential problem with the majority is that it applies a *Rosenberger* "free speech" analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* "freedom of association" case (which deals with the formulation of the content of such speech).

The majority concurrence held the School District was restricting only "access" to a limited public forum because of the subject matter to be discussed. *See Rosenberger*, 515 U.S. at 828–38 (holding that in a limited public forum such as a high school, the school can "reasonably" regulate

topics of discussion so long as the restrictions are viewpoint neutral); *Truth,* 542 F.3d at 651 (Fisher, J. and Wardlaw, J., concurring). But this is not what happened. The School District told the Club that it could not be recognized because it required its members to comply "'in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible.'" *Truth,* 542 F.3d at 639. Thus, it was telling the Club how its expression must be determined. In doing so, the majority's holding flies directly in the face of Supreme Court precedent. "The forced inclusion of an unwanted person [Here, a non-Christian in a Christian Bible study group] in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648.

In *Dale*, a scout leader was fired from the Boy Scouts once the Scouts discovered Dale was actively involved in the homosexual rights movement. 530 U.S. at 644–45. The Court held "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. Thus, Dale's presence would "interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Id.* at 654. *Dale* is not only illuminating, it is determinative of this case. The same test applied in *Dale* should apply here.

In *Dale*, the Court stated:

> In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), we observed that implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. *See ibid.* (stating that protection of the right to expressive association is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is intrusion into the internal structure or affairs of an association like a regulation that forces the group to accept members it does not desire. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, freedom of association plainly presupposes a freedom not to associate.

Id. at 647–48 (citations, internal quotation marks, and brackets omitted).

As was the case of the Boy Scouts, the school district here "at the very least" forces the Christian Bible study group to send a message that its agenda, discussions, and meetings can be framed, and their content determined, by non- Christians.

Another form of interference with the right of expressive association was involved in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). There, Massachusetts law was applied to force the inclusion of homosexuals and bisexuals to participate in a St. Patrick's Day parade organized by a separate group. The Court found this forced association would alter the parade organizers' intended message. *Id.* at 573. Hence, the forced presence of the homosexual contingent would have a substantial effect on the content of the association's expression and violated the association's First Amendment right to expressive association. If forced inclusion of unwanted marchers has a "substantial effect" on the group's intended message, how much more so does the forced inclusion of non-believers to direct the message given by a religious group to its members and the public?

Further, the majority concurrence fails to discuss the seminal case of *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1980), where the Court held Wisconsin could not order the Democratic National Convention to have the Wisconsin delegation vote for the candidate who had won the Wisconsin primary. Why? Because the Wisconsin primary was an "open" primary, which allowed *all* voters, not just publicly professed and

registered Democrats, to vote for Democratic candidates. Rule 2A of the National Democratic Convention allowed for seating of (and voting by) delegates only if the delegates were publicly professed and registered Democrats. *Democratic Party*, 450 U.S. at 109. The Court said:

> This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State. And the freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.

Id. at 121–22 (citations omitted).

In *Democratic Party*, the National Democratic Party "expressed the concern that 'a full opportunity for all Democrats to participate is diluted if members of other political parties are allowed to participate in the selection of delegates to the Democratic National Convention.'" *Id.* at 116–17.

Change the name "Democrat" to "Christian" and the same reasoning applies here. A full opportunity for professed Christians to participate in the direction of Club affairs is "diluted" if members of other faiths—or persons without any religious faith—must have a voice in the group's expression.

Just as the issue in *Democratic Party* was whether the State could compel the National Democratic Party to seat a delegation chosen in a way that violated the Party's rules, the issue here is whether the School District can, as a condition of its "acknowledgment" (recognition), compel the Club to choose its members in a way that violates the Club's rules. The answer was "NO" in *Democratic Party, id.* at 126, and should be "NO" here.

II. Governmental infringements upon the right to expressive association are reviewed under strict scrutiny, not a limited public forum analysis.

Unfortunately, the majority concurrence ignored the reasoning which underpins the right of expressive association: that it helps to protect the ability to exercise all the other First Amendment rights, such as freedom of speech and the free exercise of religion:

> The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden by regulations adopted to serve *compelling state interests*, unrelated to the suppression of ideas, that cannot be achieved through means

> *significantly less restrictive* of associational freedoms.

Dale, 530 U.S. at 647–48 (2000) (citations, internal quotation marks, and brackets omitted) (emphasis added).

Despite this clear mandate, the majority concurrence stated that "when the state creates a *limited* public forum, . . . it may restrict access to that forum so long as the restrictions are 'viewpoint neutral and reasonable in light of the purpose served by the forum,' even if these rules have the effect of limiting a group's ability to . . . engage in expressive association." *Truth*, 542 F.3d at 651 (Fisher, J. and Wardlaw, J., concurring). Further, the majority concurrence holds that "we apply the lesser standard of scrutiny, even if the same burden on a group's rights *outside* a limited public forum would be subject to strict scrutiny." *Id.* at 652 (Fisher, J. and Wardlaw, J., concurring). The majority concurrence relies on *Rosenberger* for this proposition.

In *Rosenberger*, the University of Virginia withheld authorization for payments to a printer on behalf of a student-run newspaper because the newspaper promoted religious beliefs. 515 U.S. at 827–28. There was no claim the University required the group to determine what it wanted printed by persons who did not share the group's beliefs. The newspaper sued, raising *only* a free speech claim, *not* an expressive association claim. *Id.* Thus, the majority concurrence's reliance on *Rosenberger* is misplaced.

Furthermore, the majority concurrence's opinion causes an inter-circuit split with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In *Walker*, the dean of a public law school revoked the official status of the Christian Legal Society chapter at the law school because the Society's membership policy, which excluded from membership those who refused to sign a statement of faith, violated the law school's anti-discrimination policy. 453 F.3d at 857. Although the Society allowed anyone to attend its meetings, only those who signed the statement of faith were permitted to be voting members and officers of the organization. *Id.* at 858.

The Society sued, raising expressive association and free speech claims. The court analyzed the two claims separately, applying strict scrutiny to the expressive association claim and the limited public forum analysis to the free speech claim. *Walker*, 453 F.3d at 861–67.

The *Walker* court reversed the district court's denial of an injunction restoring the official status of the Society. It first ruled the Society had demonstrated probability of success on its "expressive association" claim; the law school had withdrawn official status solely on the grounds that the Society required its controlling membership and officers to abjure homosexual conduct, a claimed violation of the school's anti-discrimination rules. As such, the school's rules were found to violate the Society's right to select its members who would significantly affect the Society's expression.

The *Walker* court then turned to the free speech claim. It held that even if official status recognition afforded only "limited public forum" availability, the record compelled a finding the Society was not granted equal protection. The school had allowed Muslim, Adventist and other groups to exclude controlling membership on the basis of beliefs conflicting with the central tenets of the organizations.[19] The circuit court issued an injunction ordering restoration of the Society's official status.

Curiously, the majority concurrence acknowledges the Seventh Circuit applied strict scrutiny to the expressive association claims, but claimed it did so because it could not determine whether the university had created an open, limited or nonpublic forum. *Truth*, 542 F.3d at 652 n.1 (Fisher, J. and Wardlaw, J., concurring) ("Although the Seventh Circuit applied strict scrutiny in addressing this claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum."). This is an error that can be made only by a partial reading of the *Walker* decision. The *Walker* court actually wrote:

> Whether SIU [the school in question]'s student organization forum is a public, designated public, or nonpublic forum is an

---

[19] Of course, the majority's opinion differs from *Walker*'s in that it remanded to the district court for factual development of whether the School District was denying Equal Protection rights to Truth by "acknowledging" groups which discriminated on bases other than religion (i.e., gender) which bases were also prohibited by the school discrimination policy.

> inquiry that will require further factual development, and that is a task properly left for the district court. *But even assuming at this state of the litigation that SIU's student organization forum is a non-public forum-making the lowest level of scrutiny applicable—we believe CLS has the better of the argument.*
>
> * * *
>
> Whether the policy is reasonable in light of the purposes the forum serves cannot be determined on this record because we do not know precisely what those purpose are (we could speculate, but that would be inappropriate). *We need not reach this aspect of the inquiry, however, given our conclusion that CLS has demonstrated a likelihood of success on its claim that SIU is applying its policy in a viewpoint discriminatory fashion. SIU has singled out CLS for derecognition. The record may be spartan, but every part of it right now points to success for CLS.*

453 F.3d at 866–67 (emphasis added).

The *Walker* court determined that even if the free speech claim were tested under the lowest scrutiny of the "reasonableness" test, the Society was still entitled to its injunction. To say that the Seventh Circuit did not rule on the expressive association claim because it could not rule on the free speech claim is not only a *non sequitur* because

the two claims are distinct; it is a flat-out misrepresentation.

Walker is on all fours with our case. The majority concurrence clearly establishes a circuit conflict.

Conclusion

The majority concurrence correctly recognized that Free Speech regulation of a school's group cannot turn on the viewpoint the group expresses. But by permitting the school to regulate the *membership* which controls the group's expression, it ineluctably controls the group's viewpoint—"personnel *is* policy."[20] From this error, the majority concurrence logically assesses the school action by a "reasonable relation" test rather than the "strict scrutiny" test, which expressive association requires under the First Amendment. For both these reasons, and because the majority concurrence's opinion clashes with a Seventh Circuit case involving similar non-Christian membership requirement in a Christian group, en banc rehearing should have been granted. I must respectfully dissent from the order denying en banc review.

---

[20] Herbert E. Meyer, *Personnel is Policy*, Feb. 4, 2007, http://www.americanthinker.com/blog/2007/02/personnel_i _policy.html, referring to Herbert E. Meyer in the Reagan administration. For a more recent thought in the same vein, *see* Thomas B. Edsall, *The Obama Test: Personnel is Policy*, October 24, 2008, http://www.huffingtonpost.com/2008/10/24/the-obama testpersonnel_n_137757.html.

WARDLAW and FISHER, Circuit Judges, concurring in the denial of rehearing en banc:

We write to address significant inaccuracies in Judge Bea's dissent from rehearing en banc.

As the unanimous opinion made clear, this case is not about the school's recognition of Truth as a school group, but the school creating Truth "as a *school-sponsored* group." *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 648 (9th Cir. 2008). Our concurrence amplified this point, explaining that the government is not required to subsidize expression, including expression through expressive association, within limited forums of its own creation as long as it restricts access to the forum according to reasonable, viewpoint-neutral rules. *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1938-44 (2006) (arguing that the government is not obligated to support expressive association, and only must not discriminate based on viewpoint).

Additionally, we have not created a circuit split with *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In *Walker*, the Seventh Circuit held that the Christian Legal Society showed a likelihood of success on free speech and expressive association claims. In our concurrence, we noted that the Seventh Circuit explicitly stated "that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum." *Truth*, 542 F.3d at 652 n.1

(Fisher & Wardlaw, JJ., concurring). We did not, as Judge Bea asserts, say that the Seventh Circuit applied strict scrutiny to SIU's alleged violation of CLS's expressive association rights "*because* it could not determine" what type of forum was created. Dissent at 12 (emphasis added). The unanimous opinion's holding is entirely consonant with the Seventh Circuit: we agreed that viewpoint discrimination is always prohibited no matter what type of forum exists and remanded Truth's claim that Kent School District applied its nondiscrimination policy in a selective and discriminatory manner for further investigation by the district court.

United States Code Annotated
Title 20. Education
Chapter 52. Education for Economic Security
Subchapter VIII. Equal Access

§ 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that--

(1)the meeting is voluntary and student-initiated;

(2)there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3)employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4)the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5)nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--

(1)to influence the form or content of any prayer or other religious activity;

(2)to require any person to participate in prayer or other religious activity;

(3)to expend public funds beyond the incidental cost of providing the space for student-initiated

meetings;

(4)to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5)to sanction meetings that are otherwise unlawful;

(6)to limit the rights of groups of students which are not of a specified numerical size; or

(7)to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

CREDIT(S)

(Pub.L. 98-377, Title VIII, § 802, Aug. 11, 1984, 98 Stat. 1302.)

Current through P.L. 111-1 approved 1-16-09

United States Code Annotated
Title 20. Education
Chapter 52. Education for Economic Security
Subchapter VIII. Equal Access

§ 4072. Definitions

As used in this subchapter--

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

CREDIT(S)

(Pub.L. 98-377, Title VIII, § 803, Aug. 11, 1984, 98 Stat. 1303.)

Current through P.L. 111-1 approved 1-16-09

United States Code Annotated
Title 20. Education
Chapter 52. Education for Economic Security
Subchapter VIII. Equal Access

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

CREDIT(S)

(Pub.L. 98-377, Title VIII, § 804, Aug. 11, 1984, 98 Stat. 1304.)

Current through P.L. 111-1 approved 1-16-09

United States Code Annotated
Title 20. Education
Chapter 52. Education for Economic Security
Subchapter VIII. Equal Access

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

CREDIT(S)

(Pub.L. 98-377, Title VIII, § 805, Aug. 11, 1984, 98 Stat. 1304.)

Current through P.L. 111-1 approved 1-16-09.

3210

NONDISCRIMINATION

The district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status, previous arrest unless a clear and present danger exists, incarceration, or physical, sensory or mental disabilities.

The superintendent shall provide for the annual evaluation, periodic surveys, annual notice and complaint procedures as required by law to ensure that there is equal opportunity for all students in the district.

The superintendent shall designate employees to serve as affirmative action officer and the Title IX compliance officer.

Cross References:

Board Policy	2121	Curriculum Adoption
	2150	Cocurricular Program
	2311	Instructional Materials

Legal References:

RCW	28A.640	Sexual Equality Mandated for Public Schools

	49.60	Law Against Discrimination
	42 U.S.C. §§ 12101-12213	Americans with Disabilities Act
WAC	180-40-215	Student Rights
	392-190	Equal Educational Opportunity—Sex Discrimination Prohibited
	34 CFR Part 104	Rehabilitation Act of 1973, Section 504

Adopted By Board: 6/22/94

Revised By Board: 5/12/99

http://www.kent.k12.wa.us/district/policies/2310.html 3/31/2000

KENTRIDGE HIGH SCHOOL

CLUB CHARTER APPLICATION

Kentridge clubs provide academic, social and athletic opportunities and experiences. All Kentridge clubs must be chartered prior to any fund raising activities. The following steps will be involved in the chartering process.

1. All prospective clubs must complete a Kentridge Club Charter Application. The application may be obtained in the Activities Office.

2. The completed application should be turned in to the Activities Coordinator.

3. The application is reviewed by the ASB and Activities Coordinator. A recommendation is the presented to the Principal.

4. The membership list is reviewed to verify that all members have purchased an ASB card.

5. The applicant is notified for the approval or denial of the request.

6. All chartered clubs and activities (sports) must perform a school/community service.

All clubs are expected to follow district/school policies; clubs failing to adhere to these standards may have their charter revoked.

CLUB NAME: Truth DATE: 4-24-03

PURPOSE: To study the Bible and the Gospel of Christ and to associate with other believers in Christian fellowship wherein our faith may be expressed to those in the club as well as those outside of the

AMOUNT OF MONEY YOU NEED TO FUNCTION THIS YEAR: $50

HOW DO YOU INTEND TO RAISE THIS MONEY? (be specific)

1. From voluntary contributions of the members.

2. From ASB funds as allocated to ASB approved clubs.

FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: Providing a biblically based club for those wanting to 1) Grow in their relationship with Jesus Christ, 2 Study the Bible, 3) Associate in fellowship with other Christians, and 4) Express the love of Christ and His soul-saving grace through character, speech, conduct and behavior.

SCHOOL/COMMUNITY SERVICE: Volunteering at Union Gospel Mission (or similar organizations) approximately 2 times per year.

MEMBERSHIP CRITERIA: A true desire to study the Bible and grow in a relationship with Jesus Christ. Only those

willing to sign the statement of faith may be voting members.

ADVISOR'S SIGNATURE: _____

CLUB OFFICERS:

CONSTITUTION ON FILE: Attached

PRESIDENT: To be voted on

SECRETARY: To be voted on

TREASURER: To be voted on

OTHER OFFICERS: To be voted on

A CURRENT MEMBERSHIP LIST MUST BE ATTACHED TO THE APPLICATION (to be voted on)

****

APPROVED ____ DENIED ____ DATE: _____

ASB PRESIDENT: _____

ACTIVITIES COORDINATOR: _____

Student Club Constitution
TRUTH CONSTITUTION

Article I

The name of this club shall be known as Truth.

The following scriptures provide inspiration and support for the name "Truth."

John 8:32 Speaking to the believing Jews, he says that if they hold to His teachings, they're really his disciples. He says, "Then you will know the truth, and the truth will set you free."

Psalm 26:3 "for your love is ever before me, and I walk continually in your truth." In this Bible club, we'll strive to learn how to walk in the plan God has set out for us, and learn how to follow Him, and "walk in His truth".

Psalm 43:3 "Send forth your light and your truth, let them guide me..."

Article II
General Purposes

The general purpose of Truth is to provide an opportunity for students to meet together during noninstructional time to study the Bible and to teach the Gospel of Jesus Christ. Truth seeks to succeed at the following purposes:

1. To provide education about the Bible.
2. To provide information to all about Jesus Christ.
3. To provide a positive Christ-like atmosphere where students can meet.

The following scripture provides inspiration for meeting with the purpose of studying the Bible and Jesus Christ.

Matthew 18:20 "For where two or three come together in my name, there am I with them.

Article III
Membership

Any student truly desiring to participate in the study of the Bible may join us as a member. However, only persons who honestly sign the Statement of Faith attached hereto as Exhibit "A" are entitled to vote. A quorum for voting purposes shall consist of not less than four students eligible to vote. If school policy requires a sponsor for each noncurricular organization, then the club sponsor shall not be entitled to vote and the appointment of said sponsor shall not be construed as a school endorsement of the club. The officers of the organization shall be as follows:

1. President, Vice President, Secretary and Treasurer.
2. President and Secretary will be combined offices.
3. Vice President and Treasurer will be combined offices.

4. Any student holding office must honestly sigh the Statement of Faith and believe in and be committed to biblical principles.

The character, behavior, speech and conduct of every person participating in the club reflects upon the religious expression and association of the club. Therefore, the privilege of membership is contingent upon the member complying in good faith and Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible.

Biblical standards for leaders of churches and studies are outlined in I Timothy 3:2-7

Article IV
Meetings and Election of Officers

Meetings shall be conducted weekly consistent with school policy for other noncurricular organizations and not inconsistent with state or federal law. There shall be at least on annual meeting for the purpose of electing officers to be held in September of each year unless otherwise agreed upon by a vote of the membership. One week before the annual meeting, nominations may be made by the membership for officers to be placed on the slate of membership the following week. Nomination of officers may also be made from the floor at the time of the annual meeting. All votes must be cast by secret ballot and the candidates receiving the most votes of those members eligible to vote shall be installed as officers which term shall take effect immediately. Any vacancy in any office occurring before the next

annual meeting shall be filled within two weeks pursuant to the same procedures outlined herein.

Article V
Duties and Responsibilities

The duties and responsibilities of the officers shall be as follows:

Section 1 – President

The president or the president's designee shall preside at all meetings and shall insure that all meetings are conducted properly. The president shall have the responsibility for the spiritual leadership and guidance of the club. The president shall be primarily responsible for the leading of the club in Bible study and prayer.

Section II – Vice President

The vice president shall assist the president. If at any time the president is unable to perform the duties of president by reason of illness, incompetence, absence, or resignation, the vice president shall temporarily act as president until such time as an election occurs to fill the vacancy of president. Therefore, the vice president shall be secondarily responsible for the spiritual leadership, guidance, Bible study and prayer of the club.

Section III – Secretary

The secretary shall be responsible for posting any time or place of any meeting. The secretary or the

secretary's designee shall also be responsible for counting ballots during the annual election. The secretary shall also be responsible for keeping any records of minutes.

Section IV – Treasurer

The treasurer shall be responsible for any monies under the direction, control or possession of the club.

Article VI
Adoption

This constitution shall be adopted by two-thirds majority vote of those members eligible to vote.

Article VII
Amendments

This constitution may be amended at any regular or annual meeting provided that the specific amendment is read or posted two consecutive weeks prior to the vote on the amendment. The amendment must be adopted by two-thirds majority vote of the membership entitled to vote. Any amendment shall take effect immediately unless a motion otherwise specifies a time certain.

_____ _____

Secretary President

Kentridge High School
Club Charter Application

Kentridge clubs provide academic, social, and athletic opportunities and experiences. All Kentridge clubs must be chartered prior to any fund raising activities. The following steps will be involved in the chartering process.

1. All prospective clubs must complete a Kentridge Club Charter Application. The application may be obtained in the Activities Office.

2. The completed application should be turned in to the Activities Coordinator.

3. The application is reviewed by the ASB and Activities Coordinator. A recommendation is then presented to the Principal.

4. The membership list is reviewed to verify that all members have purchased an ASB card.

5. The applicant is notified of the approval or denial of the request.

6. All chartered clubs and activities (sports) must perform a school/community service.

All clubs are expected to follow district/school policies; clubs failing to adhere to these standards may have their charter revoked.

CLUB NAME: Earth Corps (YMCA) DATE: 3-30-90

PURPOSE: To promote public awareness and interest for environmental issues influencing our community

AMOUNT OF MONEY YOU NEED TO FUNCTION THIS YEAR: $ 0

HOW DO YOU INTEND TO RAISE THIS MONEY? (BE SPECIFIC)

1. Specific Fundraisers feeding back to Earthcorps

2. _____

FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: Provide environmental awareness

SCHOOL/COMMUNITY SERVICE: To create environmental improvements through activities such as recycling, tree planting, clean up involvement etc.

MEMBERSHIP CRITERIA: Interest and dedication toward environmental issues.

ADVISORS' SIGNATURE: (signature)

CLUB OFFICERS

~~PRESIDENT~~: Melissa Haney

~~VICE PRESIDENT~~: Valisa Smith

~~SECRETARY~~: Heather Fowller

~~TREASURER~~: Nicole Meinzer

OTHER OFFICERS: _____

A CURRENT MEMBERSHIP LIST MUST BE ATTACHED TO THE APPLICATION.

****

APPROVED X DENIED ____ DATE: 4-12-90

ASB PRESIDENT: (signature) _____

ACTIVITIES COORDINATOR: (signature) _____

Kentridge High School
Club Charter Application

Kentridge clubs provide academic, social, and athletic opportunities and experiences. All Kentridge clubs must be chartered prior to any fund raising activities. The following steps will be involved in the chartering process.

1. All prospective clubs must complete a Kentridge Club Charter Application. The application may be obtained in the Activities Office.

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3. The application is reviewed by the ASB and Activities Coordinator. A recommendation is then presented to the Principal.

4. The membership list is reviewed to verify that all members have purchased an ASB card.

5. The applicant is notified of the approval or denial of the request.

6. All chartered clubs and activities (sports) must perform a school/community service.

All clubs are expected to follow district/school policies; clubs failing to adhere to these standards may have their charter revoked.

CLUB NAME: Gay-Straight Alliance DATE: 10-1-99

PURPOSE: see attached

AMOUNT OF MONEY YOU NEED TO FUNCTION THIS YEAR: $ 0

HOW DO YOU INTEND TO RAISE THIS MONEY? (BE SPECIFIC)

1. n/a

2.

FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: see attached

SCHOOL/COMMUNITY SERVICE: To educate people throughout the school and community about GLBTQ* people in the hopes of providing a greater understanding and acceptance of this group.

MEMBERSHIP CRITERIA: Students at Kentridge High School, must be willing to work towards the goals of the club.

ADVISORS' SIGNATURE: (signature)
(signature)

CLUB OFFICERS

PRESIDENT: Lindy Webster

VICE-PRESIDENT: Barb Hamilla

SECRETARY: _____

TREASURER: _____

OTHER OFFICERS: _____

A CURRENT MEMBERSHIP LIST MUST BE ATTACHED TO THE APPLICATION.

****

APPROVED ✓ DENIED ____ DATE: _____

ASB PRESIDENT: (signature) _____

ACTIVITIES COORDINATOR: (signature) _____

ADMINISTRATOR: (signature) _____

*Gay, lesbian, bisexual, transgendered, and questioning

PURPOSE: The purpose of this club will be to bring GLBTQ* issues into the open, while working to decrease homophobia. We will work towards changing stereotypes and prejudices formed against the gay community and create a safe talking environment for people who what to discuss GLBTQ* issues. We will work to fight heterosexism

and other forms of oppression while trying to educate others about GLBTQ* people.

FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: To educate others about GLBTQ* people. To work towards changing prejudices and stereotypes formed against this group of people. To provide a safe environment to discuss GLBTQ* issues.

*Gay, lesbian, bisexual, transgendered, and questioning

CONSTITUTION FOR KENTRIDGE GAY-STRAIGHT ALLIANCE

ARTICLE I: NAME AND PURPOSE

Section I:
The name of this organization is the Gay-Straight Alliance

Section II:
The purposes of this organization are as follows:

I: Promote tolerance and acceptance of diversity in sexual orientation

II: Create a safe environment for all students

III: Create a school environment where all can feel welcomed and accepted for there *(sic)* unique talents and contributions.

IV: Enjoy the full benefits of the public education system free from fear of harassment or persecution

ARTICLE II: MEMBERSHIP

Section I:
Any student or faculty member of Kentridge High School is eligible for membership and may join the club if they meet the qualifications listed in Section 2.

Section II:
The qualifications for membership are as follows:

I. Any student or faculty member interested may attain membership By participating in club meetings.

ARTICLE IV: OFFICERS

Section I:
The election of officers should be carried out as follows:

A meeting held towards the end of the previous school year to determine who will serve as officers in the year to come. During this meeting, those present will have several items of business to fulfill. These will include the following:

I. Identifying various positions, to be filled by one person each, who fulfillment will serve as a boon to the organization's purposes and goals.
II. The nomination of particular individuals to serve in the position, a vote will be held among those present to determine who of the nominated shall hold it. Each candidate shall be allowed a short speech

in which he or she may outline his or her qualifications to serve his or her goals if he or she were to be elected. After these speeches, the vote will be held, and the majority will preside over the results. The vote shall be held as in deemed necessary by those present.

III. After the election, officers are immediately instated in their positions and are obligated to fulfill their duties, described in Section II, for the upcoming school year.

Section II:
The duties and power of an officer are as follows:

I. The officers must fulfill the obligations mandated by that officers elected role.
II. The officer must attend a majority of the meetings held throughout the school year.
III. The officer has the power, at any time, to step down from his or her position. To do so, the officer must notify the advisor and other members of the club. In the event of such a resignation, a new officer will be elected following the guidelines for election give in Section I above.

Section III:
If necessary, the impeachment of officers will proceed as follows:

If any member of the club feels that an elected officers fails to meet the responsibilities listed above, the member may call at a meeting for the impeachment of that officer. If a significant portion

of the club then agrees that the elected officer has failed in his or her duties, the impeachment will take place.

The accused officer, if impeached, may defend themselves in the interest of remaining as an officer. In this defense is not adequate to sway the opinion of the club, the officer will be removed from office, and an election, as described in Section I, will be held to determine a replacement. An impeached officer may remain as a member of the club.

ARTICLE V: MEETINGS AND ATTENDANCE

Meetings will be held as the club decides that should be held. Anyone is welcome to attend any meeting, so long as they respect and obey the rules and regulations of the club. Again, officers must attend a majority of the meetings. There are not attendance requirements for regular members.

ARTICLE VI: RULES AND REGULATIONS

The rules and regulations of the club are as follows:

I. Be knowledgeable about regulations, which govern club activities at Kentridge High School.

II. Follow all rules, regulations, and procedures as outlined by the activities office and/ or Kentridge High School.

ARTICLE VII: AMENDMENTS

Section I:
The instating of amendments: amendments to the constitution may be suggested by the advisor or any other member of the club and will be instated by a majority vote.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 29 2009
OFFICE OF THE CLERK

No. 08-1130

In the Supreme Court of the United States

TRUTH, *et al.*,

Petitioners,

v.

KENT SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, which provides that a public secondary school maintaining a "limited open forum" may not "deny equal access or a fair opportunity to, or discriminate against" a proposed student group meeting "on the basis of the * * * content of the speech" at the proposed meeting, precludes a school from applying its non-discrimination policy to withhold official recognition from a student group that excludes students from non-voting membership on the basis of a religious test.

2. Whether a viewpoint-neutral restriction on granting official recognition to a student group in the high school setting must in all cases be reviewed under a strict scrutiny standard.

RULE 29.6 STATEMENT

The Kent School District is a government entity with neither a parent company nor any non-wholly-owned subsidiaries. The other respondents are natural persons.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 524 F.3d 957. The court of appeals' order denying petitioners' petition for rehearing en banc (Pet. App. 148a-164a) is reported at 551 F.3d 850. The district court's opinion and order granting summary judgment for respondents (Pet. App. 111a-147a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2008, and a petition for rehearing was denied on November 17, 2008. On February 4, 2009, Justice Kennedy issued an order extending the time for filing a certiorari petition to and including March 10, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The text of the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, appears at Pet. App. 165a-170a.

STATEMENT

A. Background

1. Two types of non-curriculum student groups are permitted at schools within the Kent School District, which is located in Washington State. Groups chartered by a school's Associated Student Body Council ("ASB")—a group of students designated to act as representatives of the student body—are entitled to receive school funds, may use the school district finance department for purchases, receive a faculty advisor who must be present at meetings and

assist in the club's activities, meet during non-instructional time, and may be recognized in the yearbook and announce activities over the school public address system. Pet. App. 9a-10a, 112a.

Groups not chartered by the ASB may be recognized by the school principal. They are permitted to meet on school property before or after instructional hours, but they do not receive all of the privileges accorded to ASB-recognized clubs. Pet. App. 9a.

The School District has a policy requiring "equal educational opportunity and treatment for all students in all aspects of the academic and activities program," which specifies that "[e]qual opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status" and other characteristics. Pet. App. 9a. It is undisputed that "inclusion of 'creed' indicates that discrimination based on religion is prohibited." *Ibid.*[1]

2. The individual petitioners, who at the time were students at Kentridge High School, applied for an ASB charter for a club named "Truth." Pet. App. 113a. The revised charter application submitted in April 2003—which all parties agree is the relevant application for purposes of this litigation (*id.* at 13a)—states that the club's purpose is "[t]o study the Bible and the Gospel of Christ and to associate with other believers in Christian fellowship." *Id.* at 174a.

The charter application "divides the membership into three categories: voting members, non-voting members, and attendees." Pet. App. 7a. Although

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[1] The State of Washington also has adopted a statute prohibiting discrimination on the basis of religion. See Washington Revised Code § 49.60.215 (West 2006); Pet. App. 10a-11a.

"[m]eetings are open to everyone" (*ibid.*), the "privilege of membership" is "contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." *Ibid.* The proposed membership criteria include "a true desire to * * * grow in a relationship with Jesus Christ." *Id.* at 174a.

To qualify as a voting member, a student in addition would be required to sign a "statement of faith" requiring the student to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," that he or she believed that "salvation is an underserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Pet. App. 7a-8a.[2]

The ASB Council denied the application for a charter by a unanimous vote, with one member abstaining. Pet. App. 8a. The district court explained that, among other things, "[t]he ASB members were opposed to the club's faith-based membership requirement and the oath requirement for voting member status." *Id.* at 117a.[3]

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[2] The proposed charter also specified that officers were obligated to sign the Statement of Faith and to "believe in and be committed to biblical principles." Pet. App. 178a.

[3] The record indicates that there are two religious clubs in the Kent School District that are ASB approved. Pet. App. 29a n.2. A "Bible Club" at a junior high school has been in existence for ten years, and a "Truth Seekers" Bible club at a high school has been in existence for three years. Pet. App. 124a. Membership is open to all students in both clubs. *Ibid.*

B. Proceedings Below

Petitioners filed a complaint in the United States District Court for the Western District of Washington, alleging that the District had violated the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, which prohibits a public secondary school that "has a limited open forum" from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious * * * content of the speech at such meetings." The complaint also alleged violations of their First Amendment rights of free speech and expressive association; the Free Exercise Clause; the Establishment Clause; and the Equal Protection Clause.[4]

1. *The District Court's Decision.* The district court granted summary judgment in favor of respondents. Pet. App. 111a-147a.

The court based its decision exclusively on the proposed requirements for non-voting membership. Pet. App. 132a & n.10. It expressly did not address whether the School District could deny the application based solely on the restrictions on voting membership or officer status.

With respect to the statutory claim, the court concluded that the proposed membership policy was not "protected speech under the EAA"; accordingly,

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In addition, Kentridge High School has two non-ASB chartered clubs with a religious focus: the "Young Life" club (a Christian group), and the "Prayer Around the Flagpole" group. Pet. App. 6a.

[4] Petitioners instituted this action before the denial of the application for a charter, but subsequently sought relief from that decision. Pet. App. 116a-118a.

"denying the Club ASB status because of its exclusionary general membership policy does not constitute a denial of equal access or discrimination based on the content of the Club's speech. As such, the School has not violated the EAA." *Id.* at 132a.

The district court also rejected Truth's First Amendment association claims, holding that the School District's nondiscrimination policy furthers its compelling interest in "provid[ing] equal opportunity and treatment to all students to participate in school activities programs without regard to religion, race, or sex (among other things)." Pet. App. 138a. It rejected petitioners' argument that inclusion of students of other faiths as non-voting members would interfere materially with the Club's expression of its ideas:

> The general members do not control the Club's Bible study and prayer functions. They do not lead the Club in its spiritual activities, nor do they dictate or control the other members' religious beliefs

Id. at 143a. Even if the Club included those of other faiths as non-voting members, "the Club could still expound upon its particular beliefs, including for example the idea that only certain beliefs, conduct, and speech are truly Christian." *Ibid.*

The district court did not rule on the remaining claims (based on the Equal Protection Clause, Establishment Clause, and Free Exercise Clause), finding them to be "subsumed within" the First Amendment argument. Pet. App. 147a.[5]

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[5] The district court also granted summary judgment for the School District on the ground that petitioners failed to establish

2. *The Court of Appeals' Decision*. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-38a. Like the district court, the court of appeals based its decision solely on the proposed charter's requirements for non-voting membership. *Id.* at 20a & 23a n.1.

The court held that a party asserting a claim under the EAA must demonstrate—in addition to the existence of a limited open forum—"1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the 'content of the speech' at its meetings." Pet. App. 22a. It pointed out that "content of the speech" has "a particular meaning in First Amendment jurisprudence" (*id.* at 23a), holding that the Act's prohibition is triggered "to the extent the limitation [on a club] is justified with reference to the expressive content of the regulated conduct." *Id.* at 24a.

Here, the court held, "[o]n their face, the District's non-discrimination policies do not preclude or discriminate against religious speech" (Pet. App. 26a) and the District did not "justif[y] its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content neutral." *Id.* at 27a. Accordingly, the District's policies "do not implicate any rights that Truth might enjoy under the Act." *Ibid.*

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a basis for liability under *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), and its progeny. Pet. App. 121a-130a. The court of appeals reversed that determination. Pet. App. 19a-20a. Respondents have filed a conditional cross-petition (No. 08-1268) with respect to that ruling.

The court observed, however, that petitioners also contended "that the District violated the Act by allowing certain groups an *exemption* from the non-discrimination policy" but allegedly refused to grant such exemptions to religious groups. Pet. App. 28a. "If indeed the District has a policy of enforcing the non-discrimination policy only against religious groups," the court stated, "this policy would of course violate the Act." *Ibid.* The court reversed and remanded "for further proceedings on this limited issue." *Id.* at 29a (footnote omitted).

The court reached a similar conclusion with respect to the First Amendment association claim. It observed at the outset that "the members of Truth are not seeking merely to associate as a group; they are seeking to associate as a *school-sponsored* group" with special rights to funds, school property, and facilities. "Therefore, we must evaluate the District's denial of ASB recognition as a restriction on a 'limited public forum.'" Pet. App. 30a (citation omitted). The applicable standard, therefore, was "whether the District's policy of restricting access to the ASB forum based on compliance with its non-discrimination policy is viewpoint neutral and reasonable in light of the purposes of the forum." *Id.* at 31a.

Because "the purpose of the ASB program is to advance the school's basic pedagogical goals," and "instilling the value of non-discrimination" is a legitimate part of a school's mission, the District's decision to restrict ASB charters "based on a group's willingness to adhere to the school's non-discrimination policy is reasonable in light of the purposes of the forum." Pet. App. 32a.

The court also determined that the policy is viewpoint neutral, because "the school is not denying

Truth [a charter] based solely on its religious viewpoint, but rather on its refusal to comply with the District's nondiscrimination policy." Pet. App. 33a. "[T]he District no more engaged in viewpoint discrimination by excluding Truth for refusing to comply with is non-discrimination policy than it would have engaged in viewpoint discrimination by refusing to grant ASB status to a Student Pro-Drug Club that refused to obey the school's anti drug policy." *Ibid.*

As with the statutory claim, the court pointed out that "[t]here is evidence in the record that other groups * * * were granted ASB recognition despite violating the District's non-discrimination policy." Pet. App. 33a. It reversed and remanded with respect to petitioners' claim that they were "denied an *exemption* from the non-discrimination policy based on the content of [their] speech." *Ibid.* (emphasis in original). It also reversed and remanded with respect to petitioners' Free Exercise Clause, Establishment Clause, and Equal Protection Clause arguments resting on the same contention. *Id.* at 34a.

Judges Fisher and Wardlaw joined a concurring opinion, further explaining why any burden on petitioners' right of expressive association resulting from application of the non-discrimination policy was properly assessed under the standard governing access to a limited public forum. Pet. App. 35a-38a.

The Ninth Circuit denied rehearing en banc with two judges dissenting. Pet. App. 148a.[6]

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[6] The district court on remand denied the parties' joint motion to stay proceedings pending this Court's disposition of the cer-

REASONS FOR DENYING THE WRIT

The unanimous decision below is correct and does not conflict with any decision of another court of appeals or with a decision of this Court. Moreover, the decision is interlocutory: The court of appeals reversed and remanded parts of the district court's ruling on both the statutory and constitutional claims. Petitioners accordingly may receive full relief in the district court or on an appeal of the remanded issues. If they do not, this Court would have the opportunity to review the court of appeals' rulings here as well as its rulings with respect to the closely-related remanded issues. Review at this time plainly is not warranted.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS REGARDING THE QUESTIONS PRESENTED.

Petitioners' claims of conflicts among the courts of appeals are simply wrong. The decisions petitioners cite accord fully with the ruling in this case.

A. Equal Access Act

Petitioners assert (Pet. 11) that the statutory holding below conflicts with *Hsu* v. *Roslyn Union Free School District*, 85 F.3d 839 (2d Cir. 1996). As both courts below explained, however, the opinion in *Hsu* leaves no doubt that the Second Circuit would reach the same conclusion with respect to the issue presented here.

The question in *Hsu* was whether the EAA was implicated by a school's determination that a reli-

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tiorari petition. (The statement in the certiorari petition that the district court issued a stay (Pet. 13 n.5) is in error.)

gious club could not apply a religious test for *leadership positions*. Because the content of speech at a club's meeting would be affected by the beliefs of those holding such positions—who set the agenda for meetings—the Second Circuit concluded that the Act prohibits a school from requiring non-discrimination with respect to leadership positions. 85 F.3d at 857-858.

Indeed, the Second Circuit expressly distinguished the issue in this case, stating that a "religious test" for general membership in a student group would be "plainly insupportable" because "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." *Hsu*, 85 F.3d at 858 & n.17.

The court below distinguished *Hsu* on precisely this basis. Pet. App. 27a-28a; see also *id.* at 134a (same reasoning by district court). There accordingly is no conflict regarding the statutory issue.

B. The First Amendment

Petitioners contend (Pet. 29-31) that the court of appeals' First Amendment ruling conflicts with *Christian Legal Society* v. *Walker*, 453 F.3d 853 (7th Cir. 2006). That case is plainly distinguishable. Indeed, as with *Hsu*, the Seventh Circuit's holding in *Walker* indicates that it would reach the same result as the court below on the facts presented here.

Walker involved a decision by Southern Illinois University to revoke the official status of the law school's Christian Legal Society chapter after the group refused to allow "active homosexuals" to become voting members or to assume leadership positions. The University concluded that this member-

ship limitation violated its policy prohibiting discrimination on the basis of sexual orientation. 453 F.3d at 858.

Reviewing the district court's denial of a preliminary injunction, the court of appeals concluded that the plaintiffs had a reasonable likelihood of prevailing on their First Amendment expressive association and free speech claims for several reasons. First, the court found a likelihood of success on the claim that the CLS had not in fact violated any university policy. 436 F.3d at 860-861. That determination alone distinguishes the *Walker* holding—petitioners do not contend that the School District's nondiscrimination policy was inapplicable here.

Second, the *Walker* court went on to conclude that application of the nondiscrimination policy "would significantly affect CLS's ability to express its disapproval of homosexual activity" because forcing it to change its standards for "voting members and officers" would inevitably "impair its ability to express disapproval of active homosexuality." 453 F.3d at 862, 863.

That conclusion—as both the court below and the *Hsu* court explained—has no application to membership standards for *non*-voting members. A voting member, by virtue of her ability to vote for the leaders of her choice, can have a significant impact on the agenda of the group. But a non-voting member could not have that impact; indeed, the Seventh Circuit distinguished the impact of the university's action by pointing to the very different situation of requiring that meetings be open to individuals who do not satisfy the membership criteria. 453 F.3d at 863.

Because the present case involves only non-voting members, the Seventh Circuit's conclusion is wholly inapposite. And the court's reasoning seems to indicate that it would reach the same conclusion as the court below on the facts presented here.[7]

The third basis for the *Walker* court's finding of a reasonable probability of success on the merits involved the plaintiff's free speech claim. The court found it unnecessary to determine the nature of the forum—public, limited, or nonpublic—because of the "strong evidence that the [university] policy has not been applied in a viewpoint neutral way." 453 F.3d at 866. The court concluded that "SIU has applied its antidiscrimination policy to CLS alone, even though other student groups discriminate in their membership requirements on grounds that are prohibited by the policy"; the plaintiff therefore "demonstrated a likelihood of success on its claim that SIU is applying its policy in a viewpoint discriminatory fashion." *Id.* at 866-67.

The court below similarly recognized that discriminatory application of a policy could give rise to a

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[7] Petitioners contend (Pet. 12-13, 29) that *Walker* holds that expressive association claims always trigger strict scrutiny analysis, and that the failure of the court of appeals to apply that standard here establishes a conflict with *Walker*. But *Walker* applied strict scrutiny because the court determined that the application of the university's policy "significantly affect[ed] CLS's ability to express its disapproval of homosexual activity" (436 F.3d at 862), and that finding rested on the result of invalidating membership criteria for "voting members and officers" (*ibid.*). Here, where the court's decision related only to the application of a nondiscrimination policy to non-voting members, the predicate for application of strict scrutiny is not present.

First Amendment violation, and it reversed the district court's grant of summary judgment with respect to petitioners' discrimination claim and remanded for further proceedings. Here too, the court below's decision is wholly consistent with *Walker*, because nothing in *Walker*'s free speech analysis cast doubt on the conclusion of the court of appeals here that even-handed application of the nondiscrimination policy with respect to non-voting members does not implicate the First Amendment.

There is yet another reason why *Walker* does not conflict with the decision below: the important differences between the high school and university setting. In particular, this Court has traditionally recognized that school districts have greater latitude in regulating student speech in primary and secondary schools than colleges and universities whose students are older. See, *e.g.*, *Healy* v. *James*, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is particularly 'the marketplace of ideas.'"); *Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that university students are "young adults," who are "less impressionable than younger students"); see generally *Tinker* v. *Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (First Amendment is "applied in light of the special characteristics of the school environment").

There is no reason to assume that the First Amendment would apply identically to the high school and university settings with respect to these issues.[8] That is yet another reason why there is no conflict between *Walker* and the decision below.

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[8] For example, a high school is not required to tolerate speech that would undermine its "basic educational mission." *Bethel*

Finally, petitioners argue (Pet. 31-32) that the reasoning of the court of appeals here conflicts with *Cuffley* v. *Mickes*, 208 F.3d 702 (8th Cir. 2000), because the Eighth Circuit did not apply forum analysis to the expressive association claim in that case. The decision in *Cuffley* is identical to the analysis of the free speech claim in *Walker*—the court did not have to consider the nature of the forum because it found that the defendant *had* engaged in viewpoint discrimination.

The question in *Cuffley* was whether the exclusion of the Ku Klux Klan from the Adopt-A-Highway program violated the Klan's First Amendment rights. The court found the State's assertion that it based its decision on the Klan's discriminatory membership policy "so obviously unreasonable and pretextual" that it could only conclude that in denying the Klan's application to participate in the Adopt-A-Highway program the State engaged in "viewpoint-based discrimination." *Id.* at 711-712 (noting that the State admitted, with remarkable candor, that it had paid special attention to the Klan's application because of the Klan's beliefs and advocacy). See *id.* at 706 n.3 (explaining why court did not need to decide whether program was a public forum). Like the Seventh Circuit in *Walker*, the court simply had no need to inquire into the type of forum created by the Adopt-A-

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Sch. Dist. v. *Fraser*, 478 U.S. 675, 685 (1986). The basic educational mission of a public high school involves teaching the "'habits and manners' of civility essential to a democratic society," including "tolerance of divergent political and religious views." *Id.* at 681. In virtue of the relative youth and inexperience of their students, secondary schools have a greater interest in taking steps to teach students to be tolerant than law schools.

Highway program in order to find a constitutional violation.

Far from establishing a conflict, therefore, the decisions cited by petitioners confirm the absence of a conflict regarding the questions presented on the facts of this case.

II. PETITIONERS HAVE AN OPPORTUNITY TO PREVAIL ON THEIR STATUTORY AND CONSTITUTIONAL CLAIMS ON REMAND.

The decision below is interlocutory: the court of appeals reversed the grant of summary judgment with respect to a portion of petitioners' statutory and constitutional claims. Petitioners may receive full redress in the proceedings on remand. If they do not, they may again seek review by this Court of any adverse decision with respect to the remanded claims, and this Court then would be able to assess all of petitioners' claims at once with the added benefit of a fully developed record. That is a compelling additional reason why certiorari should be denied now.

The court of appeals reversed the district court's summary judgment and remanded for further proceedings on the "limited issue" of whether the School District discriminated on the basis of religion or on the basis of the content of petitioners' speech in refusing to grant an exemption from the District's nondiscrimination policy. Pet. App. 29a, 33a, 34a; see also *supra* at 7, 8.

Proceedings in the district court are ongoing (the district court denied the parties' motion for a stay pending this Court's disposition of the certiorari petition) and the parties are actively preparing for trial. If petitioners prevail on remand—showing that "the

District has a policy of enforcing the nondiscrimination policy only against religious groups," which "would of course violate the [Equal Access] Act" (Pet. App. 28a) and the Constitution (*id.* at 34a)—they would be entitled to obtain relief.

If petitioners are not successful on remand, they may obtain review in the court of appeals and, if that too is unsuccessful, seek certiorari and raise their claims relating to both the present determination by the court of appeals as well as the final judgment entered once the allegation of pretext has been resolved. And at that time the Court would have the benefit of the additional factual development on remand, which could well provide important illumination of the issues raised by petitioners.

For these reasons, the Court should deny review now and allow the parties to finish the ongoing remand proceedings.[9]

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[9] Some of petitioners' amici point to the recently-filed certiorari petition seeking review of *Christian Legal Society* v. *Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009), cert. pending, No. 08-1371. But the certiorari petition states that *Kane* involves the application of a nondiscrimination policy to an organization's criteria for *voting* members and leadership positions. *E.g.*, No. 08-1371 Pet. 9 (explaining impact of policy on "criteria for choosing officers and voting members"). The constitutional claims in that case therefore present issues different from those raised in this case, for the reasons explained in the text.

III. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CHALLENGES TO THE APPLICATION OF THE NON-DISCRIMINATION POLICY.

By ruling consistently with the other courts of appeals, the Ninth Circuit reached the correct result with respect to both the EAA and First Amendment issues presented. The EAA does not protect free-standing associational claims that are not related to protected speech at school-group meetings, and petitioners cannot make the requisite connection. In the same vein, the Ninth Circuit was correct to apply this Court's forum jurisprudence to petitioners' free association claims, and came to the correct conclusion. The consistency between the analysis below and that in the court of appeals decisions cited by petitioners—and the fact that only two judges of the court of appeals' 27 active judges dissented from denial of rehearing en banc—demonstrates that the lower courts need no further guidance on the issues presented.

A. The Equal Access Act

The Ninth Circuit properly began its analysis with the text of the EAA, which makes it "unlawful for any public secondary school * * * [to] discriminate * * * on the basis of the * * * *content of the speech* at such meetings." 20 U.S.C. § 4071(a) (emphasis added). It is elementary that where the language of a statute is clear and unambiguous, courts "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 129 S.Ct. 1058, 1063-1064 (2009); *Massachusetts* v. *EPA*, 549 U.S. 497, 527-534 (2007). The language at issue is absolutely clear: discrimination is prohibited, and only prohibited, with regard to the "content of the speech at [covered] meetings." The word "asso-

ciate" and its cognates are nowhere to be found in the EAA.

Citing to a fragment of legislative history, petitioners argue that the EAA nonetheless impliedly protects associational rights as such. Pet. 16-18. As the court below, and Second Circuit in *Hsu*, held, however, the statutory text protects *speech*, and protects association only insofar as free association is necessary for a group to control its speech. See *Hsu*, 85 F.3d at 859. Hence the Ninth Circuit correctly focused its analysis, first, on whether there was any evidence indicating that the District's denial of ASB status was based on animus towards the group's religious speech, and, second, on whether the general membership limitation was necessary for petitioners to control the content of speech at meetings.

1. The Ninth Circuit correctly concluded that respondents' action did not constitute action that "den[ies] equal access or a fair opportunity to, or discriminate[s] against" Truth on the basis of the content of speech at its meetings. 20 U.S.C. § 4071(a). "Equal access" means offering access to school facilities "on the terms available to other groups." *Widmar*, 454 U.S. at 270-71. Requiring that all student groups seeking ASB status must first comply with district policies and state law prohibiting discriminatory practices offers the same terms to all and does not differentiate based on the "nature of their speech," but rather regulates discriminatory *acts*. See *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (holding that conditioning access to government benefits on compliance with a non-discrimination policy regulates acts, not speech). Hence denial of ASB status

did not discriminate against petitioners on the basis of the content of their speech.

Petitioners claim that allowing schools to differentiate between student groups based on groups' discriminatory membership criteria would render the EAA's protection of speech a "hollow guarantee." Pet. 14. However, this Court's precedents prove that robust protection of speech need not inhibit appropriate government policies that regulate certain categories of acts. The fact that a policy prohibiting certain pernicious acts has a differential effect on groups holding particular viewpoints does not render that policy facially viewpoint discriminatory; whether the policy is viewpoint discriminatory depends on the government's intention with respect to the speaker's message. See, *e.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 385 (1992) ("[N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."); *Madsen* v. *Women's Health Center*, 512 U.S. 753, 762-63 (1994) (holding that an injunction against anti-abortion protesters was not viewpoint discriminatory because "none of the restrictions imposed by the court were directed at the contents of petitioner's message").

Petitioners failed to provide any evidence establishing that the non-discrimination policies were created "with reference to the content of a message Truth's discriminatory conduct may attempt to convey." Pet. App. 27a. Without that evidence, there is no foundation to petitioners' claim that the non-

discrimination policies are facially viewpoint discriminatory.

2. To the extent that the EAA protects expressive association, it does so only to safeguard "the content of the speech at [school group] meetings." 20 U.S.C. § 4071(a). But, as the Second Circuit pointed out in *Hsu*, it is "difficult to understand" how permitting non-Christians to be low-level, general members would undermine a religious student group's control over the speech at its meetings. 85 F.3d at 858 n.17. Because any implicit protection of expressive association under the Act is aimed at protecting student groups' right to speak, the District's requirement that general members be admitted on a non-discriminatory basis does not pose a threat to Truth's expressive activities as protected by the EAA.

Petitioners have no persuasive response on this score, arguing only that "[a]llowing those who lack desire to have a relationship with Jesus Christ" to be general, non-voting members "would significantly undercut the core message Truth is seeking to convey inside and outside of its group." Pet. 24. Insofar as the EAA seeks to protect only "speech" at "meetings," not inchoate messages conveyed "outside of [a] group" by excluding students from non-voting membership, Truth's alleged associational communication is not within the EAA's sweep.

3. The Ninth Circuit's analysis is consonant with this Court's analysis of expressive association rights in the constitutional context. Although the Court in *Boy Scouts of America* v. *Dale*, indicated that deference should be given "to an association's view of what would impair its expression," it went on to note: "That is not to say that expressive association can erect a shield against antidiscrimination laws simply

by asserting that mere acceptance of a member from a particular group would impair its message." 530 U.S. 640, 653 (2000). In *Dale,* the Court weighed how different membership levels would affect the Scout's expressive activity to varying degrees, and deferred to the Scouts' reasonable conclusion that being forced to accept a "gay rights activist" as a troop leader would necessarily impair the Scouts' anti-homosexual message to a degree that First Amendment protections applied.

Here, Truth has provided no reasonable explanation of how the exclusionary criterion for non-voting membership advances its speech, beyond the conclusory assertion just quoted. *Dale* permits—indeed, requires—that courts look behind such allegations to ascertain whether they have a reasonable basis to which deference is appropriate. No such basis has been offered; and petitioners' conclusory claim is undercut significantly by their willingness to open meetings to all attendees. Thus, contrary to petitioners' claims, the *Hsu* and *Truth* courts' use of similar calculus (and their distinction regarding leaders) in the EAA cases is in keeping with this Court's expressive association jurisprudence.

B. The First Amendment

Petitioners argue that the Ninth Circuit's use of forum analysis to determine a student group's First Amendment rights is inappropriate when associational rights are at stake, and that the decision below is thus in conflict with *Boy Scouts of America* v. *Dale* and *Healy* v. *James*, 408 U.S. 169 (1973). Pet. 14. This contention relies on an overly broad reading of *Dale* and its antecedent cases, and on a failure to recognize *Healy*'s place in the historical development of forum doctrine. The Ninth Circuit's use of forum

analysis to determine the level of protection afforded to speech in a limited public forum (and thus, to expressive association in such a forum) correctly applies this Court's First Amendment precedents.

1. Petitioners note that this Court has not itself applied forum analysis in its expressive-association cases. Hence *Dale*, *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984), and *Bd. of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987), involved discriminatory membership conditions, but were decided using an expressive association analysis that did not involve forum analysis. See Pet. 24-26.

But the absence of forum analysis in these decisions is entirely to be expected, since *no government fora were at stake*. *Dale*, *Roberts*, and *Rotary Club* each involved groups whose broad right to operate with discriminatory membership criteria was contested under state public accommodations laws.[10] These cases thus provide no guidance as to the proper analytical frame for viewing a case that involves discriminatory membership criteria *and* a lim-

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[10] Petitioners' citation of *Democratic Party* v. *Wisconsin*, 450 U.S. 107 (1981), is inapposite. That case involved a state open primary law's attempt to require a national political party, not to take members that did not subscribe to its principles, but to conform its conduct to the votes of those nonmembers. *Id.* at 120 ("The question in this case is not whether * * * the National Party may require Wisconsin to limit its primary election to publicly declared Democrats. Rather, the question is whether * * * [Wisconsin] may then bind the National Party to honor the binding primary results * * *."). Moreover, this Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard bearer." *California Democratic Party* v. *Jones*, 530 U.S. 567, 575 (2000) (quotation marks and citation omitted).

ited public or nonpublic government forum. There is therefore no tension between the private membership cases and the Ninth Circuit's decision here.

2. Petitioners cite *Healy*, a case in which a college attempted to prevent development of a Students for a Democratic Society chapter, for the proposition that expressive association is the only doctrinal lens through which to view school group exclusion cases. Petitioners suggest that forum analysis is inappropriate here because it was not employed in *Healy*. Pet. 27.

The argument stumbles for failure to note *Healy*'s place in the historical development of forum doctrine. In 1972, when *Healy* was unanimously decided, this court had *never* applied forum analysis to college or secondary school campuses, in the speech or association context.[11]

Forum analysis was first extended to academic environments in *Widmar* v. *Vincent*, which rejected a university's ban on a religious student group's use of its facilities where the exclusion was explicitly "based on the religious content of a group's intended speech." 454 U.S. 263, 269 (1981). As petitioners acknowledge, the *Widmar* Court was clear that "it is on the bases of speech *and association rights* that we decide the case." *Id.* at 273 n.13 (emphasis added); see Pet. 17. Hence *Widmar* establishes, if *Healy* left any doubt, that expressive association claims arising in government-controlled forums are subject to the same forum analysis as claims to pure speech.

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[11] Indeed, neither the opinion under review nor the parties' briefs in *Healy* so much as mention forum analysis. *See Healy* v. *James*, 445 F.2d 1122 (2d Cir. 1971); Br. for Petrs., No. 71-452, 1972 WL 135557; Br. for Resps., No. 71-452, 1972 WL 135558.

Healy is also distinguishable from the instant case because it involved far more extreme restrictions on student speech than those claimed here. Not only did Connecticut State College deny SDS the right to form an approved student group, but SDS was also forbidden from using any sort of campus property for public postings, and students were even forbidden from meeting informally in the coffee shop to discuss SDS. 454 U.S. at 176. In this way *Healy* is closer to *Dale* than to the instant case: A substantial imposition on a group's ability to conduct its affairs, rather than a minimal non-exclusion requirement that does not even arguably challenge the group's ability to engage in its core speech. And of course *Healy* involved college, not secondary-school students', speech. *Id.* at 180.

3. Petitioners' objection to the Ninth Circuit's deployment of forum analysis in the expressive association context—and their claim that expressive association is a "distinct, elemental constitutional purpose," Pet. 28—stem from a fundamental misreading of this Court's First Amendment jurisprudence. The right to expressive association does not exist in a vacuum. Its protection stems from the protection we afford to the underlying rights to free speech and assembly. Government infringements on association rights are objectionable when they interfere with a group's expression of thoughts or ideas. Mere exclusion is not, itself, a protected mode of communication. See, *e.g.*, *Dale*, 530 U.S. at 647-48 ("Implicit in the right * * * protected by the First Amendment is a corresponding right to associate with others * * *. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.") (quotation marks and citation omitted); *Rumsfeld*,

547 U.S. at 68 ("We have recognized a First Amendment right to associate *for the purpose of speaking*, which we have termed a 'right of expressive association.'" (emphasis added)). Because expressive association is protected for its role in furthering expressive *speech*, the Ninth Circuit was correct to conclude that the level of scrutiny applied to infringements on expressive association tracks the level of protection warranted by the underlying speech right.

Thus, while it is true that *Dale* and its antecedent cases hold that "regulations affecting a group's ability to associate or disassociate must survive strict scrutiny," Pet. 24-25, these cases applied strict scrutiny because the alleged infringement on association affected the group's core speech and expression. *Dale*, *Roberts*, and *Rotary Club* concerned public accommodations laws that were being applied to encompass the *entirety* of an organization's *private and public* activities. The Ninth Circuit was correct to recognize that, in the instant case, restrictions on general, non-voting membership had no cognizable relationship to petitioners' protected speech or expression meriting strict scrutiny review of the imposition of non-discrimination requirements.

4. Unlike *Dale*, *Roberts*, and *Rotary Club*, the instant case involves contested rights of access to a government forum. In a limited public forum or nonpublic forum, governments may impose "viewpoint neutral" regulations that are "reasonable" in light of the forum's purpose. *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 106-107 (2001).

The court below correctly understood that petitioners' First Amendment claims are subject to forum analysis. Pet. App. 30a-31a. That doctrine has frequently been held to encompass government-

provided funds and other schemes that further speech. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (applying forum analysis to a university student activities fund that provided funding to student publications); *Texas* v. *Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (applying forum analysis to state Adopt-a-Highway program); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985) (applying forum analysis to examine government's exclusion of certain groups from participating in federal workplace charity drive).

The Ninth Circuit correctly applied forum analysis to ascertain that ASB status constitutes a "limited public forum." The government creates a "limited public forum" when it intentionally "opens a non-public forum to certain kinds of speakers or to the discussion of certain subjects." *Husain* v. *Springer*, 494 F.3d 108, 121 (2d Cir. 2007) (quotation marks and citation omitted); see also *Good News Club*, 533 U.S. at 106 ("When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" (quoting *Rosenberger*, 515 U.S. at 829) (alteration in original)). Restrictions on speech must be "'reasonable in light of the purpose served by the forum" and "must not discriminate against speech on the basis of its viewpoint.'" *Id.* at 106-107 (citing *Rosenberger* and *Cornelius*).

Mandating that potential speakers comply with a non-discrimination policy in order to gain access to a limited government forum is both "reasonable" and "viewpoint neutral." *R.A.V.*, 505 U.S. at 390 ("Where

the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.") See also *Boy Scouts of America* v. *Wyman*, 335 F.3d 80, 98 (2d Cir. 2003) (group's removal from nonpublic forum did not violate right to expressive association); *Evans* v. *City of Berkeley*, 129 P.3d 394, 402 (Cal. 2006) (same). The Ninth Circuit correctly concluded that—provided respondents' administration of the ASB program was not a pretext for viewpoint discrimination—the restriction on petitioners' ability to exclude students from non-voting membership should be upheld as an appropriate regulation of its limited forum. *Cf. Cornelius*, 473 U.S. at 811-13 (noting that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination," and remanding for determination of "whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view").

5. Petitioners' argument that expressive association claims must *always* receive strict scrutiny, even when arising from restrictions on a limited public forum, therefore borders on the absurd. Following petitioners' rule, expressive association would receive greater protection than the underlying right to *speech* in the forum. The Ninth Circuit correctly rejected that claim since, as explained *supra*, the associational right is itself only an outgrowth of the relevant right to speech in the forum. Pet. App. 37a (Fisher, J., concurring).

Indeed, petitioners' proposal would undo decades of law establishing that "strict scrutiny [does not]

appl[y] whenever [government] subsidizes some speech, but not all speech." *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (upholding denial of charitable exemptions to organizations attempting to influence legislation); see also *Grove City College* v. *Bell*, 465 U.S. 555, 575-76 (1984) ("Requiring [petitioner college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the program [providing federal financial assistance] infringes no First Amendment rights of the College or its students."); *Cammarano* v. *United States*, 358 U.S. 498 (1959) (upholding Treasury regulation that denied business expense deduction for lobbying activities). Restrictions on associational exclusion, like other restrictions on expressive activity in limited public forums, must be subject to reasonable, viewpoint-neutral regulation.

* * *

The Ninth Circuit correctly concluded that neither the EAA nor the First Amendment confers greater rights of associational exclusion than they do rights of speech; that the ASB status at issue in this case is properly analyzed as a limited public forum; and that, under established doctrine, respondents were entitled to apply reasonable, viewpoint-neutral nondiscrimination restrictions on applicants for ASB status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

125 (2)

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No. 08-1130

IN THE
SUPREME COURT OF THE UNITED STATES

TRUTH, an unincorporated association, et al.,

Petitioners,

v.

KENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 15.8 of this Court, petitioners file this supplemental brief to bring to this Court's attention a new authority that underscores the need to grant review in this case.

One week after petitioners filed their petition for writ of certiorari, the Ninth Circuit rendered its decision in *Christian Legal Society Chapter of the University of California v. Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009) ("*Kane*").[1] *Kane*, similar to the facts described in this petition, involved University of California, Hastings College of the Law ("UC Hastings") denying Christian Legal Society ("CLS") "registered" club status, and appurtenant benefits, including access to school facilities for meetings and office space, eligibility for funding from the school, and access to a number of channels of communication on campus. *Christian Legal Society Chapter of the Univ. of Cal. v. Kane*, 2006 WL 997217, *1 (N.D. Cal. 2006).

The *Kane* decision is significant because the Ninth Circuit premised its holding entirely on the precedent established in *Truth*, confirming that *Truth* is not a narrow decision limited to its facts, but one that fundamentally alters the legal landscape for the expressive associational freedoms of student clubs.

As a precondition for registration, UC Hastings forces student clubs to abide by the law

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[1] This decision is reprinted in the Appendix ("App.") attached to this supplemental brief.

school's non-discrimination policy. *Id.* at *2. The non-discrimination policy requires every registered student club to permit any student to participate, become a member, or become a leader, irrespective of that student's beliefs and irrespective of the effect on the group. *Id.* at *3. Accordingly, UC Hastings concluded that the CLS Statement of Faith for voting members and code of conduct requirements for officers violated its non-discrimination policy, and denied CLS's application for status as a registered student organization on that singular basis. *Id.*

CLS challenged its exclusion from the law school's forum for student organizations, claiming UC Hastings violated the group's First Amendment right to expressive association, among other claims. *Id.* at *4. The district court granted summary judgment in the law school's favor, and CLS appealed the decision. *Id.* at *27.

One week following the oral argument for the appeal, the Ninth Circuit issued an unpublished two-sentence decision summarily rejecting the expressive association claim and affirming the district court's ruling. App. 2a.[2] For this decision, the panel cited one isolated authority, *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), and upheld the constitutionality of the law school's non-discrimination policy as viewpoint neutral and reasonable. App. 2a. The *Truth* decision - representing the binding precedent in the circuit -

[2] The decision offers little reasoning and is fittingly designated "not for publication." App. 1a-2a.

foreclosed any meaningful legal analysis of the expressive association claim.[3]

The *Kane* decision reveals that the *Truth* opinion is not limited to the facts of the case. Far from it, *Kane* exposes the overreaching impact of *Truth* in three distinct ways – each compounding the constitutional shortcomings that saturate the *Truth* decision.

First, *Truth*'s rationale goes beyond the high school setting and expands its restrictions to cover university student groups as well – where First Amendment protection is supposed to be at its apex. *See, e.g., Keyishian v. Bd. of Regents of the Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (citation omitted). In the Ninth Circuit, college students, along with high school students, have lost their expressive association rights.

Second, while *Truth* involved a student club's selection of general members, schools may use *Truth*'s rationale to restrict how clubs select officers and voting members. These positions must now be open to non-adherents.

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[3] One of the three judges on the *Kane* panel, Judge Bea, wrote an opinion dissenting from the Ninth Circuit's denial of en banc review in *Truth*. In this opinion, Judge Bea strongly criticized the *Truth* panel's misapplication of this Court's expressive association jurisprudence. *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 855-57 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc). But despite his misgivings about the analysis in *Truth*, Judge Bea was compelled to adhere to *Truth* as binding authority in the Ninth Circuit.

Finally, as illustrated in *Kane*, *Truth*'s rationale allows schools to demand every student club permit any student to join and/or lead the club, no matter how significantly that student might alter the club's identity and message. Thus, a school may force the Young Democrats Club to allow a Republican to be its president or require the vegetarian club to grant voting privileges to meat-eaters. There could be no greater intrusion on a group's expressive association; yet, as long as a school forces every student club to accept all comers, the policy is *per se* viewpoint-neutral and reasonable – and hence constitutional – under the flawed legal framework formed by the Ninth Circuit in *Truth*.

Kane demonstrates that the *Truth* decision is not a one-time aberration, but a ruling that signifies lasting and adverse consequences to the right to expressive association in various contexts. And, because this result conflicts with holdings of this Court, and other circuits, Truth's petition for writ of certiorari ought to be granted.

Respectfully Submitted,

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APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, aka Hastings Christian Fellowship,
Plaintiff-Appellant,
v.
MARY KAY KANE; in her official capacity as Chancellor and Dean of University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; MAUREEN E. CORCORAN; EUGENE L. FREELAND; CARIN T. FUJISAKI; JOHN T. KNOX; JAN LEWENHAUPT; JAMES E. MAHONEY; BRIAN D. MONAGHAN; BRUCE L. SIMON; JOHN K. SMITH; TONY WEST, in their official capacities as the Board of Directors of the University of California, Hastings College of the Law,
Defendants-Appellees.

No. 06-15956

D.C. No. CV-04-04484-JSW

MEMORANDUM*

FILED
MAR 17 2009
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U.S. COURT OF APPEALS

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted
March 10, 2009—San Francisco, California

Before: Kozinski, Chief Judge,
and
Hug and Bea, Circuit Judges.

The parties stipulate that Hastings imposes an open membership rule on all student groups--all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. Truth v. Kent Sch. Dist., 542 F.3d 634, 649-50 (9th cir. 2008).

AFFIRMED